246 N.C. App.—No. 2 Pages 191-363

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MAY 31, 2018

MAILING ADDRESS: The Judicial Department
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OF
NORTH CAROLINA

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[1]Appointed 1 August 2016 [2]Sworn in 1 January 2017 [3]Sworn in 1 January 2016 [4]Appointed 24 April 2017
[5]Retired 31 December 2016 [6]Retired 24 April 2017

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COURT OF APPEALS

CASES REPORTED

FILED 15 MARCH 2016

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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of the analysis. This is especially true in cases of child sexual abuse, where children are often incompetent or (as in this case) unavailable to testify. **State v. McLaughlin, 306.**

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Public Officers and Employees—termination of correctional officer—just cause—Where petitioner was terminated from his employment as a correctional officer after an inmate under his supervision died from dehydration, the Court of Appeals rejected his argument that the Administrative Law Judge (ALJ) who upheld his termination erred by finding and concluding that just cause existed for petitioner's termination for grossly inefficient job performance. The Court of Appeals concluded that petitioner's actions of allowing the inmate to remain lying on his bed in handcuffs for five days, without receiving anything to drink during that time, and without any attention to his condition, was a violation of applicable rules and a breach of petitioner's responsibility as a senior correctional officer that contributed directly to the inmate's death. **Blackburn v. N.C. Dep't of Pub. Safety, 196.**

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SCHEDULE FOR HEARING APPEALS DURING 2018

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2018:

January 8 and 22

February 5 and 19

March 5 and 19

April 2, 16 and 30

May 14

June 4

July None

August 6 and 20

September 3 and 17

October 1, 15 and 29

November 12 and 26

December 10

Opinions will be filed on the first and third Tuesdays of each month.

BENNETT v. HOSPICE & PALLIATIVE CARE CTR. OF ALAMANCE-CASWELL

[246 N.C. App. 191 (2016)]

LINDA M. BENNETT, as Executrix for ELIZABETH H. MAYNARD, Deceased, pro se, Personally on behalf of herself and all others similarly situated, Plaintiff
v.
HOSPICE & PALLIATIVE CARE CENTER OF ALAMANCE-CASWELL, COMMUNITY HOME CARE AND HOSPICE, LLC, THE OAKS OF ALAMANCE, LLC, JEFFREY BROWN, M.D., BETH HODGES, M.D., DOES 1-10, INCLUSIVE, Defendants

No. COA15-667

Filed 15 March 2016

1. Medical Malpractice—Rule 9 certification—fall at hospice center

N.C.G.S. § 1A-1, Rule 9(j) was applicable to a portion of an action from a fall at a hospice center and subsequent death. The trial court did not err by dismissing claims for not providing adequate medical care and providing medical treatment without informed consent for failure to include the required certification.

2. Medical Malpractice—Rule 9 certification—actions after death

The trial court did not err by dismissing some of plaintiff's claims for failure to include a N.C.G.S. § 1A-1, Rule 9(j) certification where neither the claim based on the mishandling of plaintiff's mother's body after her death nor the breach of contract claim for failure to provide bereavement services involved the provision of medical care under N.C.G. S. § 90-21.11.

Appeal by Plaintiff from order entered 26 January 2015 by Judge W. Osmond Smith, III, in Alamance County Superior Court. Heard in the Court of Appeals 30 November 2015.

Linda M. Bennett, as Executrix of the Estate of Elizabeth H. Maynard, on her own behalf, and on behalf of all others similarly situated, pro se.

Young Moore and Henderson, P.A., by Elizabeth P. McCullough and Nathan D. Childs, Davis and Hamrick, L.L.P., by Ann C. Rowe and H. Lee Davis, Jr., Yates, McLamb & Weyher, LLP, by Barry S. Cobb and Kelly A. Brewer, and Carruthers & Roth, PA, by Norman F. Klick, Jr., for the Defendant-Appellees.

DILLON, Judge.

Linda M. Bennett ("Plaintiff"), on behalf of her mother's estate, herself, and all others similarly situated, appeals from the trial court's order dismissing claims arising out of her mother's death. For the following reasons, we affirm in part and reverse in part.

I. Background

On 15 October 2014, Plaintiff filed a complaint against Defendants alleging various claims against them arising out of the circumstances surrounding the death of her mother, Elizabeth H. Maynard. The allegations in the complaint aver that Ms. Maynard had been living at a facility operated by Defendant Oaks of Alamance when she suffered a fall. She sustained injuries, but Plaintiff's sister, Pamela Roney, refused to authorize treatment for these injuries. Thereafter, Ms. Maynard's condition deteriorated, culminating eventually in her demise.

Defendants all moved the trial court to dismiss Plaintiff's claims. The matter came on for a hearing in Alamance County Superior Court. The trial court entered an order dismissing all of Plaintiff's claims for failure to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure, applicable to medical malpractice actions. Specifically, the trial court concluded that all of her claims comprised "a medical malpractice action" and that the common law doctrine of *res ipsa loquitur* was inapplicable. Defendant entered written notice of appeal.

II. Analysis

[1] Plaintiff essentially argues on appeal that Rule 9(j) of the North Carolina Rules of Civil Procedure is inapplicable to her claims, contending that her claims are not claims for "medical malpractice." We believe that most of her claims fall within the ambit of Rule 9(j) and, therefore, affirm the trial court's dismissal as to those claims. However, some of Plaintiff's claims stem from actions of some of Defendants which occurred after the death of Ms. Maynard and otherwise do not fall within the ambit of Rule 9(j). Accordingly, we reverse the trial court's Rule 9(j) dismissal as to those claims.

Plaintiff did not attach a Rule 9(j) certification to her *pro se* complaint. Notwithstanding, Plaintiff "labeled" her claims in the complaint as follows:

(1) Wrongful Death (including Loss of Chance);

(2) Medical Negligence/Medical Malpractice (including Loss of Chance);

(3) Negligence and/or Gross Negligence and/or Willful and Wanton conduct;

(4) Loss of Sepulcher;

(5) Breach of Contract, including Failure to provide bereavement benefits as contractually required;

(6) Breach of Fiduciary Duty;

(7) Bad Faith Failure to turn over requested documents and to provide information per statutory requirements;

(8) Elder Abuse, and/or, Conspiracy to Commit Elder Abuse, and/or Failure to report Elder Abuse as required by North Carolina Statute;

(9) Emotional Distress and Suffering of the Decedent's Survivors;

(10) Pain and suffering of the Decedent;

(11) Conspiracy and/or Collusion with the above.

Plaintiff lists these eleven (11) claims at the beginning of her complaint and then proceeds to make a number of general allegations. The complaint is otherwise not well organized. However, it is evident from those allegations that she seeks damages (1) for certain acts of Defendants which occurred prior to her mother's death *and* (2) for certain acts of some of the Defendants which occurred after her mother's death. We address each category of claims separately below.

Regarding the claims arising from Defendants' acts occurring before the death of Plaintiff's mother, it appears that Plaintiff seeks damages due to the failure by Defendants to provide adequate medical care for her mother once she sustained injuries from her fall and/or the provision of certain medical treatment without informed consent. We hold that the trial court correctly concluded that these claims fell within the ambit of Rule 9(j); and, therefore, the trial court did not err in dismissing these claims.

Rule 9(j) states in relevant part as follows:

> Any complaint alleging medical malpractice by a health care provider . . . shall be dismissed unless . . . [t]he pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have

> been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care[.]

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2014). As our Supreme Court has observed, Rule 9(j) "prevent[s] frivolous malpractice claims by requiring expert review *before* filing of the action." *Moore v. Proper*, 366 N.C. 25, 31, 726 S.E.2d 812, 817 (2012) (emphasis in original). Therefore, "a court must dismiss a complaint if it fails to meet the [Rule's] requirements." *In re Wooden ex rel. Jones v. Hillcrest Convalescent Ctr., Inc.*, 222 N.C. App. 396, 402, 731 S.E.2d 500, 505 (2012).

Each of the Defendants in the present case falls within the statutory definition of health care provider. *See Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 137, 472 S.E.2d 778, 781 (1996) (holding that "[a] medical malpractice action is any action for damages for personal injury or death arising out of the furnishing of or failure to furnish professional services by a health care provider as defined in [N.C. Gen. Stat.] § 90-21.11"). Specifically, sub-subdivision (a) of N.C. Gen. Stat. § 90-21.11 defines "health care provider" to include those "who . . . [are] licensed[] or [] otherwise registered or certified to engage in the practice of . . . medicine[.]" N.C. Gen. Stat. § 90-21.11(1)(a) (2012). The statute also includes hospitals, nursing homes, and adult care homes in this definition, *see id.* § 90-21.11(1)(b), as well as those who are "legally responsible for the negligence of," or "act[] at the direction or under the supervision of," such health care providers, *see id.* § 90-21.11(1)(c)-(d).

Each of the claims for acts which occurred prior to Plaintiff's mother's death fits within the definition of "medical malpractice action," as set out in subdivision (2) of the statute. Specifically, subdivision (2) provides:

> (2) Medical malpractice action. — Either of the following:
>
> a. A civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider.
>
> b. A civil action against a hospital, a nursing home . . . , or an adult care home . . . for damages for personal injury or death, when the civil action (i) alleges a breach of administrative or corporate duties to the patient, including, but not limited to, allegations of negligent credentialing or negligent monitoring and supervision and (ii) arises from

> the same facts or circumstances as a claim under sub-subdivision a. of this subdivision.

Id. § 90-21.11(2).

Here, all of Plaintiff's claims stemming from actions leading up to the death of her mother concern the provision (or lack thereof) of health care to Plaintiff's mother. Plaintiff has not pleaded any facts which suggest that *res ipsa loquitur* applies. Accordingly, we hold that the trial court did not err in dismissing these claims for failure to include a certification pursuant to Rule 9(j).

We are not persuaded by Plaintiff's argument that Rule 9(j) does not apply where no patient-physician relationship existed between Defendants and Plaintiff's mother, or, alternately, where Defendants were not furnishing professional health care services to her mother. As demonstrated by the language of N.C. Gen. Stat. § 90-21.11 and our Supreme Court's holding in *Horton*, the definition of medical malpractice under North Carolina law is not so restrictive, encompassing "action[s] for damages for . . . death arising out of the furnishing of or failure to furnish professional services by a health care provider," *see* 344 N.C. at 137, 472 S.E.2d at 781, including the provision of such services by nursing homes, adult care homes, and those "legally responsible for the negligence of," or who "act[] at the direction or under the supervision of," these nursing homes and adult care homes, *see* N.C. Gen. Stat. § 90-21.11(1)(a)-(d) (2012). Furthermore, taking the allegations in Plaintiff's complaint as true, as we are required to do, *see Acosta v. Byrum*, 180 N.C. App. 562, 566, 638 S.E.2d 246, 250 (2006), Defendants were, indeed, furnishing professional health care services to her mother at the time she died, Plaintiff's arguments on appeal to the contrary notwithstanding. Therefore, we hold that the claims alleged in Plaintiff's complaint for certain acts of Defendants which occurred prior to her mother's death are medical malpractice claims. Accordingly, the trial court did not err in granting Defendants' motions to dismiss where Plaintiff failed to include the required certification under Rule 9(j) of the Rules of Civil Procedure.[1]

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1. Plaintiff also seeks to raise several arguments not raised below for the first time on appeal, contending, for example, that Ms. Maynard's informed consent was ineffective. However, our Court has recently held that "[c]laims based on lack of informed consent are medical malpractice claims requiring expert testimony and [] must comply with the requirements of Rule 9(j)." *Kearney v. Bolling*, ___ N.C. App. ___, ___, 774 S.E.2d 841, 850 (2015). Moreover, issues or theories of a case not raised at the trial level will not be entertained for the first time on appeal. *See, e.g.*, *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001). Therefore, we do not reach these remaining arguments.

[2] However, turning to Plaintiff's claims arising from actions by some of the Defendants after the death of her mother, it appears that Plaintiff is claiming damages due to (1) the negligence by some of the Defendants in handling her mother's body ("Loss of Sepulcher") and (2) the breach of contract by Defendant Hospice for failing to provide to her certain bereavement services. We hold that these claims do not fall within the ambit of Rule 9(j). Specifically, neither the claim based on the mishandling of Ms. Maynard's body after her death, nor the breach of contract claim for failure to provide bereavement services, involves the provision of medical care under N.C. Gen. Stat. § 90-21.11. Accordingly, we hold that the trial court erred in dismissing these claims for failure to include a Rule 9(j) certification.[2]

AFFIRMED IN PART, REVERSED IN PART.

Chief Judge McGEE and Judge DAVIS concur.

SHAWN BLACKBURN, PETITIONER
v.
N.C. DEPARTMENT OF PUBLIC SAFETY, RESPONDENT

No. COA15-556

Filed 15 March 2016

1. Public Officers and Employees—termination of correctional officer—evidence of prior disciplinary history

Where petitioner was terminated from his employment as a correctional officer after an inmate under his supervision died from dehydration, the Court of Appeals rejected petitioner's argument that the Administrative Law Judge (ALJ) who upheld his termination erred by denying his motion in limine to exclude certain evidence from the hearing. Evidence of petitioner's prior disciplinary history was properly considered as part of the ALJ's review of the level of discipline imposed against him.

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2. Whether the complaint otherwise contains sufficient allegations to state claims for the post-death actions by some of the Defendants is not before us on appeal.

2. Public Officers and Employees—termination of correctional officer—material findings supported by substantial evidence

Where petitioner was terminated from his employment as a correctional officer after an inmate under his supervision died from dehydration, the Court of Appeals rejected petitioner's argument that numerous findings of fact by Administrative Law Judge (ALJ) who upheld his termination were not supported by substantial evidence. The Court of Appeals reviewed the evidentiary support for only the challenged findings that were material to the ALJ's decision and held that there was no error.

3. Public Officers and Employees—termination of correctional officer—just cause

Where petitioner was terminated from his employment as a correctional officer after an inmate under his supervision died from dehydration, the Court of Appeals rejected his argument that the Administrative Law Judge (ALJ) who upheld his termination erred by finding and concluding that just cause existed for petitioner's termination for grossly inefficient job performance. The Court of Appeals concluded that petitioner's actions of allowing the inmate to remain lying on his bed in handcuffs for five days, without receiving anything to drink during that time, and without any attention to his condition, was a violation of applicable rules and a breach of petitioner's responsibility as a senior correctional officer that contributed directly to the inmate's death.

Appeal by petitioner from the Final Decision entered 23 January 2015 by Administrative Law Judge Selina M. Brooks in the Office of Administrative Hearings. Heard in the Court of Appeals 3 November 2015.

Merritt, Webb, Wilson & Caruso, PLLC, by Joy Rhyne Webb, for petitioner-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Tamika L. Henderson, for respondent-appellee.

ZACHARY, Judge.

Shawn Blackburn (petitioner) appeals from the decision of the Administrative Law Judge (ALJ) upholding his termination as a correctional officer employed by the North Carolina Department of Public Safety (DPS or respondent) for grossly inefficient job performance. On appeal, petitioner argues that the ALJ erred by denying his motion

in limine to exclude certain evidence from the hearing; that some of the ALJ's findings of fact are not supported by the evidence; and that the ALJ erred by concluding that respondent established by a preponderance of the evidence the existence of just cause to terminate petitioner. We are aware that our correctional officers perform a difficult job, and we are sympathetic to the challenges faced by correctional officers in a prison setting. Nonetheless, after careful review of the facts and the relevant law, we conclude that the ALJ did not err and that the decision of the ALJ should be upheld.

I. Background

Petitioner was hired by DPS as a correctional officer in 1999, was promoted through the ranks, and in March 2014 petitioner was a Correctional Captain at DPS's Alexander Correctional Institution ("Alexander"). As a Correctional Captain, petitioner was responsible for interpreting, developing, and following prison procedures, as well as reviewing the work performed by others to ensure its compliance "with the goals and the missions of the . . . Department of Public Safety," including DPS's goals of ensuring "the safety of the inmates" and "the humane confinement of inmates." On 8 and 9 March 2014 petitioner was, in addition to being a Correctional Captain, Alexander's "officer in charge" or "OIC." Petitioner testified that the OIC was the person who was "left in charge of the daily running of the institution and the safety and welfare of the staff and the inmates at that institution."

Petitioner's dismissal arose from the circumstances surrounding the death of Michael Kerr, an inmate housed at Alexander in March 2014. Mr. Kerr had a history of mental illness for which he had received medication. In February 2014 Mr. Kerr was housed "in 'administrative segregation' or, as it is better known, solitary confinement[,]" *Davis v. Ayala*, __ U.S. __. __, 135 S. Ct. 2187, 2208, 192 L. Ed. 2d 323, __ (2015), initially for mental health observation. At this time Mr. Kerr was "placed on nutraloaf," which petitioner described as "a management meal that is given to inmates for disciplinary reasons to manage their behavior." At first Mr. Kerr was given milk with the nutraloaf, but on 8 March 2014 petitioner ordered that Mr. Kerr no longer receive milk, because Mr. Kerr had used the milk cartons to stop up the toilet in his cell. Pursuant to petitioner's orders, there was a sign on Mr. Kerr's cell reading "Do not give him milk per Captain Blackburn." The sign remained in place until Mr. Kerr's death, and was visible to staff on all shifts.

Alexander's "Medical Emergency Response Plan" defines a "Code Blue" as "a medical emergency . . . requiring the immediate assistance of

medical personnel." On 8 March 2014 Sergeant Johnson, a correctional officer at Alexander, called a Code Blue for Mr. Kerr because Mr. Kerr was not responding to correctional staff. When petitioner arrived at Mr. Kerr's cell, medical personnel were present and Mr. Kerr was lying on his bed in leg restraints and metal handcuffs. After medical personnel determined that Mr. Kerr did not require immediate medical treatment, petitioner allowed Mr. Kerr's leg restraints to be removed, but ordered that Mr. Kerr's handcuffs should not be removed until Mr. Kerr walked to the door and asked for their removal.

Mr. Kerr remained in handcuffs from the time that the Code Blue was called until his death on 12 March 2014. Petitioner admitted that after he ordered on 8 March 2014 that Mr. Kerr no longer receive milk, the only way Mr. Kerr could obtain any fluid would be to use his handcuffed hands under the faucet. On 9 March 2014, petitioner entered Mr. Kerr's cell with Ms. Sims, Alexander's staff psychologist. Although Mr. Kerr did not speak or sit up while petitioner and Ms. Sims were in Mr. Kerr's cell, petitioner left Mr. Kerr in handcuffs. Ms. Sims asked petitioner if a Code Blue should be called and petitioner said no. At the end of petitioner's shift, he completed a report on the day's events, called an "OIC report." Petitioner failed to note in his OIC reports for either 8 or 9 March 2014 that a Code Blue had been called for Mr. Kerr or that Mr. Kerr was still in handcuffs at the end of the 9 March 2014 day shift.

Petitioner was not at work on 10 or 11 March 2014. When petitioner returned to work on 12 March 2014, he directed Sergeant Johnson to prepare Mr. Kerr for transport to Central Prison. When Sergeant Johnson entered Mr. Kerr's cell, he found Mr. Kerr's handcuffs filled with embedded fecal matter, and saw cuts and abrasions on Mr. Kerr's wrists resulting from wearing the mechanical cuffs for an extended period of time. Petitioner directed his staff to use bolt cutters to remove the handcuffs, and Mr. Kerr was transported to Central Prison. Mr. Kerr was pronounced dead upon his arrival at Central Prison. The coroner determined that Mr. Kerr's cause of death was dehydration.

Following Mr. Kerr's death, DPS conducted an investigation which included interviewing witnesses, including petitioner, and reviewing documents. DPS conducted a pre-disciplinary conference with petitioner on 4 April 2014, and on 7 April 2014 petitioner received a letter from DPS informing him that he was being terminated from employment for grossly inefficient job performance, and stating that:

> . . . Management has decided to dismiss you, effective April 7, 2014 based on Grossly Inefficient Job Performance[.] . . .

This decision was made after a review of all of the information available, including prior disciplinary action, the current incident of Grossly Inefficient Job Performance, and the information you provided during the pre-disciplinary conference. The specific conduct reason(s) for your dismissal [are] as follows:

On March 18, 2014, you were interviewed as part of [an investigation] . . . into the death of inmate Michael Kerr. You were also interviewed on April 1, 2014 as part of an internal investigation into this same matter. During both interviews, you stated that you were notified on March 8, 2014 of a Code Blue . . . for inmate Kerr. . . . You stated you told inmate Kerr to remain on the bed until all staff were out of the cell and the door was secured. You indicated that once the door was secured, you ordered inmate Kerr to come to the door to take off the restraints and he refused. You further indicated that you informed Sergeant Johnson to have staff check Kerr every 15 minutes and offer Kerr the opportunity to have the restraints removed. You also stated, "Due to him being a segregated inmate, I was not going to risk staff safety by removing the handcuffs while staff was in his cell. He had to be behind a secured door." . . .

Records indicate that you also worked on March 9, 2014. . . . You indicated that you were aware of [Mr. Kerr's] mental state and you had notified mental health staff.

Investigators determined that inmate Kerr remained handcuffed for a period of five (5) days based on your instructions to staff to have [the] inmate remain cuffed until he was willing to submit to removal of the restraints through the cell door.

At no time during your assigned working hours on March 8, 2014 did you communicate the status of inmate Kerr, his refusal to submit to handcuff removal, or the fact that inmate Kerr's condition was deteriorating to the Assistant Superintendent for Custody and Operations.

You failed to Initiate an Incident report for a documented Code Blue Emergency.

According to the Division of Prisons' Policy and Procedures Manual, F.1504 (h)(1-2), . . . The use of instruments of

> restraint, such as handcuffs . . . are used only with approval by the facility head or designee.
>
> (1) Instruments of restraint will be utilized only as a precaution against escape during transfer, [to] prevent self-injury or injury to officers or third parties, and/or for medical or mental health reasons. . . . "
>
> The Office of State Human Resources Policy Manual, Section 7, page 2, states, "Grossly Inefficient Job Performance is the failure to satisfactorily perform job requirements as set out in the job description, work plan, or as directed by the management of the work unit or agency, and the act or failure to act causes or results in: Death or serious bodily injury or creates conditions that increase the chance for death or serious bodily injury to an employee(s) or to members of the public or to a person(s) for whom the employee has the responsibility;"
>
> Your willful violation of these policies constitutes grossly inefficient job performance. . . .
>
> After a review of the information provided, to include the Pre-Disciplinary Conference, I saw no mitigating factors regarding your actions in this matter that would warrant action less than dismissal. . . .

Petitioner appealed his termination to DPS, and on 16 July 2014 he received a letter from DPS informing petitioner that the letter was a final agency decision to uphold termination of petitioner's employment. The letter stated that:

> On March 8, 2014, a Code Blue (Medical Emergency) was called because segregation staff observed inmate Kerr to be unresponsive in his cell. . . . You ordered inmate Kerr to come to the door to have the handcuffs removed and he did not. You then told inmate Kerr that until he got up and came to the cell door and asked to have his handcuffs removed his handcuffs would not be removed. At that time, you were aware that inmate Kerr had serious mental health issues. . . .
>
> There was no record of proper medical evaluation during the time inmate Kerr was in restraints over the next five days. . . . Reports indicated that one time inmate Kerr

was observed standing; other reports indicated that he appeared to be asleep, or awake on his bunk. . . .

Nevertheless, you did not remove inmate Kerr's handcuffs because inmate Kerr did not come to the door to have the restraints removed. Your shift was scheduled off for the next two days. You left the correctional institution with your order regarding the procedure for removal of the handcuffs still in place.

On March 12, 2014, four days after your original order that inmate Kerr remain in handcuffs until he asked to have them removed, you came back on shift as the OIC and you instructed Correctional Sergeant William Johnson to prepare inmate Kerr for transfer to Central Prison. Sergeant Johnson went to the Segregation Unit and found inmate Kerr in his cell with his pants and underwear down around his ankles. He had urinated and defecated on himself. . . .

Staff could not unlock the handcuffs because they were clogged with dried feces. . . . Staff observed cuts and bruises on inmate Kerr's wrists. . . . Inmate Kerr was not seen by medical staff on March 12, 2014 prior to leaving for Central Prison. Inmate Kerr left Alexander Correctional Institution at approximately 8:30 AM and arrived at Central Prison around 11:30 AM. When he was received at Central Prison, he had expired.

. . .

You were the OIC responsible for the fact that inmate Kerr remained in handcuffs for five days. There was no valid reason for inmate Kerr to have remained in handcuffs for five days. . . . In addition, it should have been obvious that inmate Kerr was not a threat to any custody staff, that no restraints were necessary, and that he was in need of medical attention. . . . It was your obligation to remove the restraints; it was not incumbent upon inmate Kerr to ask you to do so. It was obvious from the video footage taken on March 12, 2014, that after five days inmate Kerr was so incapacitated that he was not ambulatory and could not get himself into a wheelchair from the bed, and yet the restraints were still not removed. . . . The medical testimony indicated that the cumulative evidence of

inmate Kerr's behavior shows he was nonresponsive and not being intentionally noncompliant.

As mitigation you argued that all of the other captains at Alexander had been returned to work and that you were the only Captain terminated. I find that you were differently situated from all of the other Captains because your behavior in ordering that inmate Kerr be handcuffed until he could ask to have them removed was particularly culpable behavior and may have played a role in inmate Kerr's death. Because there was no superintendent at Alexander Correctional Institution at this time, it was particularly incumbent upon you to be aware of the risks to inmates and staff and to obtain adequate guidance and supervision. . . .

[A]t no time did you seek medical advice about Inmate Kerr's condition on March 10-12, 2014. In addition, you were responsible for knowing the consequences of your order to keep inmate Kerr in handcuffs and for ensuring that he was able to take care of his personal needs, including exercise and taking nourishment.

Inmate Kerr was about 5'9" tall, weighing around 300 pounds, and medically determined to be obese. . . . You attempted to place the responsibility on another employee[.] . . . You also argued that you could not have ordered inmate Kerr's handcuffs to be removed[.] . . .

During your dismissal appeal hearing you . . . stated that inmate Kerr was in handcuffs for disciplinary reasons[.] . . . [T]he use of handcuffs was inappropriate for disciplinary reasons. . . . When questioned as to how inmate Kerr was supposed to handle his bodily functions if he was left in handcuffs, you indicated that essentially it was inmate Kerr's problem for not coming to the door to have his handcuffs removed. You also admitted that it appeared to you that that inmate Kerr's health was deteriorating over the two days you were off work, yet instead of sending inmate Kerr for medical care at the closest medical facility, he was transported three hours away to Central Prison, where he arrived dead. There appears to be no valid reasons for the restraints to have been put on initially when the inmate Kerr was examined as a result of the Code Blue. There were no valid reasons that the handcuffs were not

> removed when the exam was concluded. And there was no valid reason inmate Kerr did not receive medical care.
>
> I have also considered as an aggravating circumstance your complete lack of remorse or belief that you did anything wrong with regard to inmate Kerr. . . . Your belief that you did nothing wrong in the face of this inmate's death is evidence that you cannot continue to be employed by the Department of Public Safety. No other level of disciplinary action is sufficient to protect the inmates in the custody of the Department of Public Safety and address your conduct and behavior.
>
> In conclusion, you were the Officer in Charge (OIC) at Alexander Correctional Institution on March 8, 2014. A Code Blue was called that inmate Michael Kerr was nonresponsive. Your staff responded to the Code Blue and medical staff examined inmate Kerr. After the exam, the leg restraints were removed but not the handcuffs, and staff exited the cell. . . . You then ordered that inmate Kerr remain in handcuffs until he asked to have them removed and came to the door for that purpose. You did not ensure that the restraint policies were complied with. As a result of your order, inmate Kerr remained in the handcuffs for five days. On March 12, 2014, prior to inmate Kerr being transported to Central Prison, [Mr. Kerr's] handcuffs had to [be] cut off because they were encrusted with fecal matter. When he arrived at Central Prison, inmate Kerr was found to be unresponsive. He was pronounced dead on arrival at Central Prison.

On 7 August 2014 petitioner filed a petition for a contested case hearing with the North Carolina Office of Administrative Hearings. A three day hearing was conducted before the ALJ beginning on 2 December 2015. During the hearing petitioner acknowledged that as a correctional captain he was "required to have considerable knowledge of the department's rules, policies, and procedures concerning the custody, care, treatment and training of inmates" and that his position required "the exercise of good judgment and discretion" given that a particular situation might not be addressed in the written policies. Petitioner admitted that the responsibilities of an OIC included a duty to "take corrective action on any condition that may affect the security, safety, or welfare of a variety of people, including inmates," and "to document all unusual and important activities in the OIC shift report." Petitioner also conceded

that he was familiar with the "[DPS] Division of Prisons, Alexander Correctional Institution Standard Operating Procedure Section .0427, Restraint Procedures" which governed the correctional officers' use of restraints, including handcuffs. These regulations state that:

> Restraints may be used as a precaution against escape during transfer for medical reasons, [to] prevent self-injury, to protect staff or others or [to] prevent property damage or manage disruptive behavior where other means have failed. Restraints are never to be applied for punishment, and must be removed as soon as possible as directed by the circumstances requiring application.

Regarding the conditions of Mr. Kerr's confinement, petitioner agreed that Mr. Kerr was initially placed in handcuffs on 8 March 2014 to "secure him so medical staff could go in and evaluate him." Petitioner also admitted that he and Ms. Sims entered Mr. Kerr's cell unaccompanied by "an extraction team" and that petitioner did not carry a shield. Petitioner testified that he knew that Mr. Kerr "had been at one time [in] residential mental health," and that Mr. Kerr had never acted violently towards prison staff. Petitioner also admitted that during the 15 minute checks ordered by petitioner, the prison staff did not enter Mr. Kerr's cell or check to see if the cuffs were hurting Mr. Kerr.

The ALJ also heard testimony from several prison officials. Stephanie Leach testified that she was employed by DPS to investigate events such as the death of an inmate, and that she led the investigation into Mr. Kerr's death. Ms. Leach reviewed records indicating that Mr. Kerr had not been observed in a standing position after 8 March 2014. Ms. Leach testified that, based upon her review of a videotape and Mr. Kerr's medical records, Mr. Kerr was not capable of walking to the cell door, and was not intentionally refusing to do so, and that the coroner determined that Mr. Kerr's cause of death was dehydration.

Marvin Polk testified that had worked for DPS for over thirty years and that he conducted internal investigations into employee misconduct. In over thirty years' experience with DPS, he had never heard of an inmate being restrained in handcuffs for five days. Mr. Polk concluded that respondent "did not use sound judgment and reasoning" by leaving Mr. Kerr handcuffed for five days, and that it was the responsibility of the OIC to ensure that an inmate received necessary medical treatment. Kenneth Lassiter, DPS's Deputy Director of Operations, testified that an OIC has the authority to make decisions that are necessary for an inmate's health or safety. Mr. Lassiter did not think handcuffs should

have been applied to Mr. Kerr. When handcuffs were applied, custodial staff should have checked every fifteen minutes to make sure the handcuffs weren't causing any injury, because mechanical handcuffs of the kind used on Mr. Kerr had the potential for a serious risk of harm to an inmate, because of the risk of fluid retention. Mr. Lassiter also testified that it was "rare that metal restraints are on an inmate for more than four hours," and that he had never heard, in more than twenty-five years of working for DPS, of another instance of an inmate left in handcuffs for such "an extended amount of time."

George Solomon testified that he was DPS's Director of Prisons, that he had been employed by DPS for over thirty-five years, and that DPS's "mission is to maintain the public safety and safe and humane treatment of our stakeholders, our inmate population, [and] make sure we take care of them[.]" Mr. Solomon was responsible for the decision to fire petitioner, based on a review of interviews and petitioner's statements. Mr. Solomon testified that petitioner's acts of leaving handcuffs on Mr. Kerr and not providing Mr. Kerr with milk might have contributed to Mr. Kerr's "decompensation and deterioration."

On 23 January 2015 the ALJ entered a Final Decision that affirmed DPS's decision to uphold petitioner's termination. The ALJ concluded that respondent had shown by the preponderance of the evidence that it had just cause to terminate petitioner for grossly inefficient job performance. The ALJ's conclusions were supported by more than eighty findings of fact, which were based based on a voluminous transcript of over 600 pages and hundreds of pages of exhibits.

Petitioner has appealed the ALJ's Final Decision to this Court.

II. Standard of Review

The standard of review of an administrative agency's decision is set out in N.C. Gen. Stat. § 150B-51 (2013), which provides that

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;

> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.
>
> (c) . . . With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the *de novo* standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

"Under the whole record test, the reviewing court must examine all competent evidence to determine if there is substantial evidence to support the administrative agency's findings and conclusions." *Henderson v. N.C. Dep't of Human Resources*, 91 N.C. App. 527, 530, 372 S.E.2d 887, 889 (1988) (citation omitted). " '[T]he whole record test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence.' " *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 674, 599 S.E.2d 888, 903-04 (2004) (quoting *In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979)). Therefore, the whole record test "does not permit the reviewing court to substitute its judgment for the agency's as between two reasonably conflicting views[.]" *Lackey v. Dep't of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982).

"Where the petitioner alleges that the agency decision was based on error of law, the reviewing court must examine the record *de novo*, as though the issue had not yet been considered by the agency." *Souther v. New River Area Mental Health*, 142 N.C. App. 1, 4, 541 S.E.2d 750, 752 (internal quotation omitted), *aff'd per curiam*, 354 N.C. 209, 552 S.E.2d 162 (2001). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [ALJ]." *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citing *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002)). In addition, "[a]n administrative agency's interpretation of its own regulations is entitled to deference unless it is plainly erroneous or inconsistent with the regulation's plain text." *Total Renal Care or N.C. v. North Carolina HHS*, __ N.C. App.__, __, 776 S.E.2d 322, 327 (2015) (citing *York Oil Co. v. N.C. Dep't of Env't*, 164 N.C. App. 550, 554-55, 596 S.E.2d 270, 273 (2004)).

III. Denial of Petitioner's Motion *in Limine*

[1] Petitioner argues first that the ALJ erred by denying his motion *in limine* seeking "to restrict the respondent from producing evidence of anything other than the reasons that were [stated] in [petitioner's] April 7, 2014, dismissal letter as far as reasons to justify his termination." Petitioner argues that the ALJ violated the notice requirements of N.C. Gen. Stat. § 126-35 by considering facts and circumstances that were not specifically discussed in petitioner's pre-disciplinary letter. We conclude that petitioner's argument lacks merit.

In this case, petitioner makes only one challenge to evidence admitted over his objection, consisting of petitioner's assertion that the ALJ admitted evidence of a prior disciplinary warning against petitioner over petitioner's objection. We hold that evidence of petitioner's prior disciplinary history was properly considered as part of the ALJ's review of the level of discipline imposed against petitioner. *See Carroll*, 358 N.C. at 670, 599 S.E.2d at 901 (including, as part of its review of whether the discipline imposed was appropriate, the fact that the petitioner "has been a reliable and valued employee . . . for almost twenty years with no prior history of disciplinary actions against him."). "Career state employees, like petitioner, may not be discharged, suspended, or demoted for disciplinary reasons without 'just cause.' N.C. Gen. Stat. § 126-35(a). This requires the reviewing tribunal to examine . . . "whether [the petitioner's] conduct constitutes just cause for the disciplinary action taken." *Warren v. Dep't of Crime Control*, 221 N.C. App. 376, 379, 726 S.E.2d 920, 923 (quoting *Carroll* at 665, 599 S.E.2d at 898 (internal quotation omitted), *disc. review denied*, 366 N.C. 408, 735 S.E.2d 175 (2012). *In Wetherington v. N.C. Dep't of Pub. Safety*, __ N.C. __, __ S.E.2d __ (2015 N.C. LEXIS 1259 *14-15) (18 December 2015) our Supreme Court addressed the issue of an agency's discretion to determine the appropriate discipline:

> Just cause "is a flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case." . . . [The employee's supervisor] confirmed that he [believed that he] could not impose a punishment other than dismissal for any violation, apparently regardless of factors such as the severity of the violation, the subject matter involved, the resulting harm, the trooper's work history, or discipline imposed in other cases involving similar violations. We emphasize that consideration of these factors is an appropriate and

> necessary component of a decision to impose discipline upon a career State employee[.]

Wetherington, __ N.C. at __, __ S.E.2d at __ (quoting *Carroll*, 358 N.C. at 669, 599 S.E.2d at 900-901 (internal quotation omitted)) (emphasis added).

We have also reviewed petitioner's challenges to the admission of evidence that was not the subject of an objection at the hearing. N.C. Gen. Stat. § 126-35(a) requires that if disciplinary action is contemplated against a State employee, "the employee shall, before the action is taken, be furnished with a statement in writing setting forth the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights."

> This Court has interpreted section 126-35(a) as requiring the written notice to include a sufficiently particular description of the "incidents [supporting disciplinary action] . . . so that the discharged employee will know precisely what acts or omissions were the basis of his discharge." Failure to provide names, dates, or locations makes it impossible for the employee "to locate [the] alleged violations in time or place, or to connect them with any person or group of persons," thereby violating the statutory requirement of sufficient particularity.

Owen v. UNC-G Physical Plant, 121 N.C. App. 682, 687, 468 S.E.2d 813, 817 (quoting *Employment Security Comm. v. Wells*, 50 N.C. App. 389, 393, 274 S.E.2d 256, 259 (1981)), *disc. review improvidently allowed*, *review dismissed*, 344 N.C. 731, 477 S.E.2d 33 (1996).

In this case, petitioner received a pre-disciplinary letter on 7 April 2014 that set out the "names, dates, [and] locations" pertinent to his dismissal. This letter made it clear that the "specific acts or omissions" leading to petitioner's termination were petitioner's acts or omissions as related to Mr. Kerr's conditions of confinement in March 2014, and specifically as pertaining to petitioner's role in allowing Mr. Kerr to remain in handcuffs for five days without appropriate attention to his physical and medical condition.

On appeal, petitioner argues that the ALJ "erred as a matter of law when she allowed Respondent to present reasons other than those listed in the 7 April 2014 dismissal letter and made findings of fact and conclusions of law based on those additional reasons by which she found just cause for the termination of Petitioner's employment." Petitioner fails, however, to identify any evidence considered by the ALJ that was

not directly related to petitioner's role in Mr. Kerr's conditions of confinement during March 2014, and our own review indicates that the evidence challenged by petitioner consisted entirely of the facts and circumstances surrounding Mr. Kerr's death and petitioner's actions or inactions relevant to Mr. Kerr's death. Petitioner is apparently arguing that he is entitled to notice, not only of the acts and omissions that were the basis of his termination, but also to notice of every item of evidence pertaining to these acts and omissions. Petitioner cites no authority for his vastly expanded view of "notice" and we know of none. We conclude that petitioner is not entitled to relief on the basis of this issue.

IV. Factual Support for the ALJ's Findings of Fact

[2] Petitioner argues next that certain of the ALJ's findings of fact are not supported by substantial evidence. The majority of the ALJ's findings are not challenged and thus are conclusively established on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.") (citation omitted). Moreover, after careful review of the record and the ALJ's order, we conclude that in order to determine whether the ALJ properly ruled that respondent established by a preponderance of the evidence that respondent had just cause to terminate petitioner's employment, it is not necessary for us to assess the evidentiary support for all of the findings challenged by petitioner. We will, however, review the evidence supporting those findings that we find to be material to the ALJ's decision.

> We review a challenge to the ALJ's findings to determine whether the findings are supported by substantial evidence. N.C. Gen. Stat. § 150B-51(b), (c). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Even if the record contains evidence that could also support a contrary finding, we may not substitute our judgment for that of the ALJ and must affirm if there is substantial evidence supporting the ALJ's findings.

Renal Care, __ N.C. App. at __, 776 S.E.2d at 328 (quoting *Surgical Care Affiliates v. N.C. Dep't of Health & Human Servs.*, __ N.C. App. __, __, 762 S.E.2d 468, 470 (2014) (internal quotation omitted), *disc. review denied*, 368 N.C. 242, 768 S.E.2d 564 (2015)).

We first review petitioner's challenge to Finding No. 26, which states that "[t]he evidence indicates that Inmate Kerr was not refusing to have

his handcuffs removed but was unresponsive due to his mental health and/or physical condition." This finding is supported in part by Ms. Leach's testimony, including the following:

> Q: Based on your review, did you determine if Mr. Kerr was refusing orders or just not responding?
>
> MS. LEACH: Mr. Kerr was just not responding, which is different from refusing.
>
> Q: Based on your experience as a registered nurse, did it appear to you that Mr. Kerr was capable of walking on his own accord?
>
> MS. LEACH: No.

This finding is further supported by Mr. Lassiter's testimony that "Mr. Kerr's condition, from everything that I've read and could understand, prevented him from coming to the door." Petitioner acknowledges this testimony, but argues that the validity of these witness's testimony was impeached on cross-examination. "It is for the agency, not a reviewing court, 'to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence[,] if any.' " *Carroll* at 674, 599 S.E.2d at 904 (quoting *State ex rel. Utils. Comm'n v. Duke Power Co.*, 305 N.C. 1, 21, 287 S.E.2d 786, 798 (1982)). We conclude that this finding is supported by substantial evidence.

Petitioner also challenges the evidentiary support for Finding No. 40, which states that the ALJ "finds as fact that Petitioner did not view Inmate Kerr as a threat to the safety of Ms. Simms or himself on March 9." Petitioner argues that the fact that he entered Mr. Kerr's cell on 9 March 2014 without an extraction team or a safety shield "does not prove that [Mr. Kerr] was not considered to be a threat." We are not required to determine, however, whether this evidence "proves" petitioner's state of mind, but whether it adequately supports the ALJ's inference in this regard. We hold that the fact that petitioner entered Mr. Kerr's cell with Ms. Simms without employing the institutional safety precautions supports the ALJ's finding that petitioner did not regard Mr. Kerr as a threat.

We next review petitioner's challenge to Finding No. 46 that "[n]o evidence was offered that Petitioner ensured that custody staff actually performed checks to see if the handcuffs were too tight or causing any harm to Inmate Kerr." Petitioner does not dispute the factual accuracy of this finding, and acknowledges his own testimony that petitioner

"did not instruct custody staff to perform checks on the restraints to see if they were too tight or causing injury to Inmate Kerr[.]" Instead petitioner contends that such safety checks were not his responsibility. However, the scope of petitioner's responsibility is not relevant to the accuracy of the ALJ's finding that petitioner did not ensure that custody staff monitored Mr. Kerr's condition with respect to the handcuffs. Petitioner also argues that this finding "shifted the burden of proof" to petitioner. Finding No. 46 does not address or shift the burden of proof, but simply notes that the evidence of petitioner's failure to supervise appropriate safety checks was uncontradicted by any other evidence. We hold that this finding is supported by substantial evidence.

Petitioner next challenges Finding No. 47, which states that petitioner "concedes that in his experience no inmate had ever been left in handcuffs for more than a few hours even when the inmate was refusing to have the handcuffs removed." On appeal, petitioner argues that he did not concede that no inmate had ever been left in handcuffs for more than a few hours, but only that such a situation was "unusual." Assuming, *arguendo*, that the ALJ should have found that petitioner conceded it was "unusual" for an inmate to be in handcuffs for an extended period of time, we hold that this does not require reversal of the ALJ's order.

Petitioner next challenges the evidentiary support for Finding No. 51, which states that "Petitioner's belief that Inmate Kerr was faking and being defiant was the basis of his decision to leave him in handcuffs until he came to the cell door to have them removed." We hold that this finding is amply supported by substantial evidence. For example, petitioner testified as follows:

> Q: Okay. And I believe you testified earlier that you did not believe initiating any type of disciplinary action against Mr. Kerr would change his behavior.
>
> PETITIONER: Disciplinary action -- yes, ma'am, I testified to that.
>
> Q: What behavior did you want him to change?
>
> PETITIONER: His behavior of not coming to the door. Refusing to come to the door and be left in handcuffs. I wanted the handcuffs removed from him.

(emphasis added). Petitioner's own testimony expressly indicates that he viewed Mr. Kerr as acting defiantly, and thus supports the ALJ's finding.

Petitioner also challenges Finding No. 54, which states that on 12 March 2014 Sergeant Johnson "found Inmate Kerr lying in his own urine and feces with his pants and underwear around his ankles. He was not responsive to verbal commands but appeared to be semi-conscious." Petitioner's challenge is limited to the ALJ's use of the phrase "semi-conscious." It is undisputed, however, that Mr. Kerr was unresponsive, said nothing beyond repeating the word "Please," and fell over when placed in a wheelchair. This finding is supported by substantial evidence.

Petitioner next challenges Findings Nos. 84 and 85, which state that:

> 84. Based upon all of the admissible evidence, the Undersigned finds as fact that Petitioner did not report a Code Blue incident or ensure that subordinate staff completed a report.
>
> 85. Based upon all of the admissible evidence, the Undersigned finds as fact that Petitioner did not complete the daily OIC reports as required of an Officer In Charge.

Petitioner admits that he did not report the Code Blue incident, but offers the excuse that other correctional officers also failed to do so, a fact which if true does not change the factual accuracy of the finding. Regarding petitioner's failure to complete daily OIC reports, petitioner asserts that this was not specifically mentioned in his pre-disciplinary letter. As discussed above, however, petitioner's neglect of his responsibility to complete OIC reports was a part of petitioner's acts and omissions as specifically related to Mr. Kerr's conditions of confinement in March 2014. The ALJ did not err by making these findings.

Finally, petitioner challenges Findings Nos. 86, 87, and 88, which state that:

> 86. Based upon all of the admissible evidence, the Undersigned finds as fact that Petitioner did not exercise the discretion or good judgment required of a Correctional Captain.
>
> 87. Based upon all of the admissible evidence, the Undersigned finds as fact that Petitioner did not ensure the safe and humane treatment of Inmate Kerr.
>
> 88. After considering all of the documentary and testimonial evidence admitted in this contested case, taking particular note of the Petitioner's written statements and testimony, the Undersigned finds as fact that Petitioner

> fails to accept any personal responsibility for his actions or inactions that caused harm to Inmate Kerr.

Findings Nos. 86 and 87 are supported by the ALJ's other findings of fact that are either unchallenged or which we have determined to be supported by substantial evidence. Petitioner argues that his failure to accept personal responsibility was not listed as a reason for termination in his pre-disciplinary letter. We conclude, however, that this circumstance was relevant to the ALJ's review of the level of discipline imposed. For the reasons discussed above, we conclude that the challenged findings were supported by substantial evidence, and that petitioner is not entitled to relief on this basis.

V. Just Cause for Petitioner's Termination

[3] Petitioner's final argument is that the ALJ erred by finding and concluding that respondent had just cause to terminate petitioner for grossly inefficient job performance. We disagree.

N.C. Gen. Stat. § 126-35(a) provides that "[n]o career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause. . . . The State Human Resources Commission may adopt, subject to the approval of the Governor, rules that define just cause." Pursuant to this grant of authority, the North Carolina Office of State Human Resources has stated that "[t]here are two bases for the discipline or dismissal of employees under the statutory standard for "just cause" as set out in G.S. 126-35. These two bases [include] (1) Discipline or dismissal imposed on the basis of unsatisfactory job performance, including grossly inefficient job performance." 25 N.C.A.C. 1J .0604(b)(1). In this case, petitioner was discharged for grossly inefficient job performance, which is defined by 25 N.C.A.C. 1J.0614(5) as follows:

> (5) Gross Inefficiency (Grossly Inefficient Job Performance) means a type of unsatisfactory job performance that occurs in instances in which the employee: fails to satisfactorily perform job requirements as specified in the job description, work plan, or as directed by the management of the work unit or agency; and, that failure results in
>
> (a) the creation of the potential for death or serious bodily injury to an employee(s) or to members of the public or to a person(s) over whom the employee has responsibility[.] . . .

In order to review the ALJ's determination that respondent had established that respondent had just cause to terminate petitioner, we must consider petitioner's acts and omissions in the context of the duties of his position. As a Correctional Captain, petitioner was responsible for interpreting, developing, and implementing standard operating procedures and emergency plans, as well as reviewing the work performed by others to ensure its compliance "with the goals and the missions of the . . . Department of Public Safety," including DPS's goals of ensuring "the safety of the inmates" and "the humane confinement of inmates." During the hearing petitioner admitted that his position required "the exercise of good judgment and discretion" given that not every situation would be addressed in the written policies.

In addition to his rank as a Correctional Captain, petitioner acted as the OIC on 8 and 9 March 2014. Petitioner testified that the OIC is "the individual that's left in charge of the daily running of the institution and the safety and welfare of the staff and the inmates at that institution." Mr. Polk testified that the duties of an OIC include the following:

> The officer-in-charge of each facility within the Division of Prisons or his or her designated representative will conduct a daily inspection of the facility for the purpose of detecting and eliminating all hazards to the security, health, sanitation, safety, and welfare of staff and inmates at the facility. No condition which constitutes a threat to the sanitation, safety, or security of the prison facility will be permitted to exist.

Mr. Polk also testified that it was the responsibility of the OIC to ensure than an inmate received necessary medical care. In addition, Mr. Polk explained that, as OIC, petitioner had a responsibility to follow up on petitioner's orders regarding Mr. Kerr by communicating with the Alexander staff on 10 and 11 March when petitioner was not at the facility:

> Q. Now, how can Mr. Blackburn be responsible for what happened on March 10th and 11th if he wasn't at work that day?
>
> MR. POLK: Because on March 9th, he left the institution knowing that the inmate was still handcuffed inside the cell, and he had a duty to follow up to find out what his situation was. He was the officer-in-charge that placed those procedures in effect that no one should remove the handcuffs until he got up and walked to the door.

We conclude that petitioner had a highly placed supervisory role at Alexander, in which he gave orders to other correctional staff and had a great deal of responsibility. As a correctional captain and the OIC, petitioner was required to exercise good judgment and make discretionary decisions to further the health and safety of both the correctional staff and the inmates.

We next consider the ALJ's findings of fact to determine whether they support the ALJ's finding and conclusion that there was just cause to terminate petitioner for grossly inefficient job performance. The ALJ made the following findings of fact which are either unchallenged on appeal or which we have determined to be supported by substantial evidence:

> 1. Petitioner was employed by Respondent North Carolina Department of Public Safety (DPS) for fourteen (14) years with promotions through the custody ranks from a Correctional Officer to a Correctional Captain.
>
> 2. At the time of his dismissal, Petitioner was a Correctional Captain, the second highest rank at the Alexander Correctional Institution ("Institution")[.]
>
> 3. Petitioner testified that he was aware of and familiar with the position description of a Correctional Captain which states that "[t]he Correctional Captain is responsible for interpreting, developing and implementing Standard Operating Procedures, Post Orders, and Emergency Plans which are needed to carry out the custody assignments of the facility." The Correctional Captain also "assume[s] the responsibilities of the Assistant Superintendent for Custody and Operations in the absence of the Assistant Superintendent for Custody and Operations." The Correctional Captain "has the responsibility of reviewing work performed and ensuring that it is in compliance with the goals and missions of the Department of Corrections." An important goal of DPS is to ensure the safety and humane confinement of inmates.
>
> 4. Petitioner would regularly perform duties as the Officer In Charge ("OIC") of the Institution during his 12-hour duty assignment. An OIC has "the authority to make spontaneous decisions regarding Institution operational issues, while maintaining the safety and security of Staff, agents, volunteers, visitors, and inmates throughout the Institution

areas of control . . . [and] will directly supervise and/or monitor all areas of the Institution regarding enforcement of orderly conduct, sanitary conditions, and safety."

5. Petitioner testified that as OIC he was responsible for the daily running of the Institution and for the safety and welfare of inmates and prison staff and to document all unusual and important activities in the OIC shift report.

6. Petitioner was familiar with DPS's policies and procedures governing the treatment and confinement of inmates. . . .

. . .

8. Petitioner testified that he was aware that DPS's policies allow a considerable amount of discretion and use of judgment by a Correctional Captain because every scenario that prison staff may encounter is not covered by written policies and procedures.

9. Petitioner testified that in February 2014, he knew that Inmate Kerr "had been at one time residential mental health." He also testified that he did not know whether inmate Kerr was on administrative segregation or disciplinary segregation status, or whether he was there for mental health observation.

10. Over time, [Mr. Kerr's] segregation status was continued for disciplinary reasons for various non-violent infractions such as being loud in his cell and throwing water on the floor.

. . .

15. Inmate Kerr had been tearing up the milk cartons and putting the pieces in his toilet thereby flooding the cell so Petitioner ordered that [Mr. Kerr] no longer be provided the milk with the nutraloaf.

16. An unidentified individual put a note on Inmate Kerr's cell door "NO MILK PER CAPTAIN BLACKBURN." Petitioner testified . . . that he knew the note was posted.

17. Inmate Kerr was no longer provided milk with the nutraloaf after Petitioner's order was given, even during the shifts when Petitioner was not on duty.

18. "Code Blue" is defined as any medical situation in the confines of the Institution requiring the immediate assistance of Medical Personnel.

19. On March 8, 2014, Petitioner was the Correctional Captain on duty as the OIC when a Code Blue was called because segregation staff observed Inmate Kerr to be unresponsive in his cell.

20. When Petitioner arrived at Inmate Kerr's cell, he was lying on his bed with leg restraints on and his hands cuffed in front. Inmate Kerr lay in the bed awake, not talking or moving and, at one point, staff could not tell if he was breathing.

. . .

22. Petitioner then ordered Inmate Kerr to come to the cell door to have the mechanical handcuffs removed. Petitioner informed Inmate Kerr that his handcuffs would not be removed until he got up and came to the cell door.

23. Petitioner directed the subordinate custody staff not to remove the handcuffs until Inmate Kerr came to the door and asked that the handcuffs be removed. . . .

24. Petitioner directed custody staff to perform 15-minute safety checks on Inmate Kerr's handcuffs. The safety checks consisted of looking through the cell door at Inmate Kerr. Neither Petitioner nor his subordinate staff checked to see if the handcuffs were too tight or causing physical harm to Inmate Kerr.

25. Custody tablet reports indicate that at times staff would simultaneously report that Inmate Kerr appeared to be sleeping and [also that Mr. Kerr] refused to have his handcuffs removed.

26. The evidence indicates that Inmate Kerr was not refusing to have his handcuffs removed but was unresponsive due to his mental health and/or physical condition.

27. Petitioner did not complete an incident report for the Code Blue for Inmate Kerr on March 8, 2014 or report that Inmate Kerr was in restraints at the end of his shift on March 8, 2014. . . .

28. Petitioner noted the incident in the Shift Narrative for March 8 including the order not to remove the handcuffs until Inmate Kerr came to the cell door.

. . .

30. As OIC, Petitioner failed to note on the OIC report on March 8, 2014 that Inmate Kerr was still in handcuffs.

31. Petitioner did not call Assistant Superintendent Moose or any other resource available to him, such as the division duty officer, on March 8, 2014 to receive any type of guidance on what to do regarding Inmate Kerr. As OIC, Petitioner did not notify the Administrator (Moose) that Inmate Kerr remained in handcuffs at the end of shift.

32. Petitioner was the OIC on March 9, 2014.

. . .

36. On March 9, 2014, Petitioner entered Inmate Kerr's cell with staff psychologist Dara Simms without an extraction team, the required number of custody staff, or the shield for protection.

. . .

38. Inmate Kerr remained on his bed unresponsive even after Petitioner tried to rouse him with his hand and by pulling Inmate Kerr's blanket out of his hands.

39. Ms. Simms asked Petitioner if a Code Blue should be called, but Petitioner responded that a Code Blue was not necessary. They exited the cell and left Inmate Kerr in the handcuffs.

40. The Undersigned finds as fact that Petitioner did not view Inmate Kerr as a threat to the safety of Ms. Simms or himself on March 9.

41. Petitioner's notes in the Shift Narrative for March 9 record Inmate Kerr in handcuffs.

42. At the end of his shift on March 9, 2014, Petitioner did not include in the OIC report that Inmate Kerr remained in handcuffs.

43. Petitioner took his scheduled off-duty days on March 10 and 11, 2014 leaving in place his order that Inmate Kerr remain in handcuffs.

44. Inmate Kerr remained in handcuffs from March 8 through March 12, 2014. Segregated Unit Shift Narratives completed by the OIC for each day record that Inmate Kerr remained in handcuffs in his cell.

45. Neither Petitioner nor any of the other OICs noted that Inmate Kerr was still in handcuffs on their OIC reports for March 8, 9, 10, or 11, 2014.

46. No evidence was offered that Petitioner ensured that custody staff actually performed checks to see if the handcuffs were too tight or causing any harm to Inmate Kerr.

47. Petitioner concedes that in his experience no inmate had ever been left in handcuffs for more than a few hours even when the inmate was refusing to have the handcuffs removed.

. . .

49. Despite the fact that Petitioner asserted that Inmate Kerr was simply refusing to obey his commands to come to the door to have the handcuffs removed, neither Petitioner nor any other custody staff ever initiated any type of disciplinary action against Inmate Kerr for his supposed refusal.

50. The Undersigned finds as fact that Inmate Kerr was not in handcuffs due to violent behavior or any other behavioral reason.

51. Petitioner's belief that Inmate Kerr was faking and being defiant was the basis of his decision to leave him in handcuffs until he came to the cell door to have them removed.

52. Petitioner had the authority to simply order that the handcuffs be removed.

53. On Mach 12 2014, Petitioner instructed Correctional Sergeant William Johnson to prepare Inmate Kerr for transport to Central Prison for mental health care.

54. When Sergeant Johnson went to Inmate Kerr's cell he found Inmate Kerr lying in his own urine and feces with his pants and underwear around his ankles. He was not responsive to verbal commands but appeared to be semi-conscious.

55. The Undersigned reviewed a video of Inmate Kerr being prepared for transport to Central prison: correctional staff physically put clean pants on Inmate Kerr; an additional officer was called to retrieve a wheelchair and then lifted Inmate Kerr into the wheelchair; he appeared to be slumping in the wheelchair.

56. Sergeant Johnson informed Petitioner that the handcuffs could not be unlocked because they were caked with feces. Petitioner ordered Sergeant Johnson to use bolt cutters to remove the handcuffs.

57. Various staff observed cuts and bruises on Inmate Kerr's wrist[s] from being in handcuffs for an extended period of time. Custody staff gave Inmate Kerr bandaids.

58. Corrections Officer James Quigley stated in written statements dated March 18, 2014 and April 1, 2014 that when he assisted with dressing Inmate Kerr, he observed "open wounds on his right wrist." In his written statement, Sergeant Johnson noted "cuts" on Inmate Kerr's wrist caused by the handcuffs.

59. No evidence was offered that Inmate Kerr ever got up from his bunk after the evening of March 8, 2014 until he was physically removed from his cell on March 12, 2014.

60. Inmate Kerr did not see medical staff before leaving the Institution at 8:30 a.m. and was dead upon arrival at Central Prison at 11:30 a.m.

61. As a result of Inmate Kerr's death, a Sentinel Event team conducted an investigation at the Institution into his death and submitted a report to DPS.

62. As a result of that report, DPS's Professional Standards Office conducted internal investigations into the conduct of several employees, including Petitioner.

63. Marvin Polk, an investigator with the Professional Standards Office with DPS, conducted the internal

investigation regarding Petitioner's conduct and submitted a report dated April 5, 2014 to DPS management which recommended disciplinary action against Petitioner.

64. Mr. Polk testified that in his thirty years working for the department he had never known an inmate to have been left in handcuffs for five days. He testified that handcuffs should have been removed from Inmate Kerr by assembling a team with a shield, removing the handcuffs and backing out of the cell.

65. Kenneth Lassiter, Deputy Director of Operations for DPS, has been employed by DPS for twenty-five years and is familiar with the DPS's policy and procedures related to the care and confinement of inmates. He testified that handcuffs can create the potential for a serious risk of harm and, therefore, custody staff are trained to ensure that the handcuffs are not embedded or cutting into an inmate's skin.

66. During the internal investigation, Petitioner gave three written statements.

67. On March 18, 2014, Petitioner stated that he had dealt with Inmate Kerr a couple times on the segregation unit and mental health unit.

68. On April 1, 2014, Petitioner stated that on March 9, 2014, he discussed with Nurse Triplett that he was aware of Inmate Kerr's mental state and that he "had notified Mental Health Staff."

69. In another statement on April 1, 2014, Petitioner stated that a Code Blue was called on March 8, 2014 for Inmate Kerr.

. . .

71. On April 4, 2014, Petitioner attended a Pre-Disciplinary Conference wherein the reasons supporting discipline were given to him. Petitioner was given an opportunity to respond orally and in writing. Petitioner gave verbal and written statements[.] . . .

72. On April 4, 2014, Petitioner submitted a written statement "to fully explain my thought process and decision making for the events that occurred over the weekend."

He wrote that on March 8, he did not know Inmate Kerr's mental health status "or that his medical status had changed or that he needed any further medical assistance or needs."

. . .

74. After the Pre-Disciplinary Conference, Director Solomon reviewed the Sentinel Event Report, Internal Investigation report, witness statements and all available information including Petitioner's prior active written warning and years of service, making a decision to discipline Petitioner. On July 18, 2013, Petitioner had received a written warning for Unacceptable Personal Conduct for falsely recording time on his timesheets. In that written warning Petitioner was directed to review department, division and facility policies and procedures specific to his responsibility as a Correctional Captain, and also was warned that if any further performance or conduct incidents occurred that he would be subject to discipline up to and including dismissal.

75. On April 7, 2014, Petitioner was dismissed based upon Grossly Inefficient Job Performance.

76. Respondent's dismissal letter dated April 7, 2014, states the specific conduct as reasons for the dismissal.

77. Respondent's dismissal letter dated April 7, 2014, is based upon the Division of Prison's Policy and Procedures Manual, P .1504(h)(1-2) which states:

> . . . . The use of instruments of restraint, such as handcuffs, leg cuffs, waist chains, black boxes and soft restraints are used only with approval by the facility head or designee.
>
> (1) Instruments of restraint will be utilized only as a precaution against escape during transfer, [to] prevent self-injury or injury to officers or third parties, and/or for medical or mental health reasons. . . .

78. Petitioner appealed his dismissal to the Employee Advisory Committee where he was given the opportunity to speak and present evidence to the committee.

79. In his Step 2 Grievance Filing, concerning Inmate Kerr "Remaining In Handcuffs," Petitioner stated that Inmate Kerr "remained in cuffs of his own free will" and "these orders were only for Saturday 3/8/14 morning and thru [sic] end of shift on Sunday 3/9/14."

80. In his Step 2 Grievance Filing, Petitioner submitted a written "Closing Statement" excusing his actions because of "[t]he lack of a clear procedure deprived me of a concise understanding of what was expected during this type of incident." He also complained that "[n]o one else did anything different [from] what I did but I am the one sitting here with no job while the other OIC's are back to work."

81. [Respondent] presented evidence that as a result of Inmate Kerr's death and the events surrounding it, a total of twenty-five employees faced discipline: nine were dismissed (including an Assistant Superintendent); one was reassigned down (Region Director); one was demoted (Assistant Superintendent); ten received a written warning; two received a TAP entry; and two resigned.

82. On June 3, 2014, the Employee Advisory Committee unanimously recommended that the dismissal be upheld.

83. On July 16, 2014, a Final Agency Decision was issued by Commissioner W. David Guice upholding the dismissal.

84. Based upon all of the admissible evidence, the Undersigned finds as fact that Petitioner did not report a Code Blue incident or ensure that subordinate staff completed a report.

85. Based upon all of the admissible evidence, the Undersigned finds as fact that Petitioner did not complete the daily OIC reports as required of an Officer In Charge.

86. Based upon all of the admissible evidence, the Undersigned finds as fact that Petitioner did not exercise the discretion or good judgment required of a Correctional Captain.

87. Based upon all of the admissible evidence, the Undersigned finds as fact that Petitioner did not ensure the safe and humane treatment of Inmate Kerr.

> 88. After considering all of the documentary and testimonial evidence submitted in this contested case, taking particular note of the Petitioner's written statements and testimony, the Undersigned finds as fact that Petitioner fails to accept any personal responsibility for his actions or inactions that caused harm to Inmate Kerr.

To summarize, the undisputed evidence and the ALJ's findings establish the following material facts and circumstances:

> 1. In March 2014 petitioner was a Correctional Captain and acted as the OIC at various times. Petitioner's position required that he not only know and follow prison rules and regulations, but that he respond with discretion and good judgment to situations that were unexpected or were not addressed in written guidelines.
>
> 2. On 8 and 9 March 2014 petitioner was the OIC at Alexander, a position that placed him in a supervisory role over the institution and made him responsible for the exercise of good judgment by him and by the staff in order to promote the health and safety of staff and inmates.
>
> 3. On 8 March 2014 petitioner ordered that Mr. Kerr must remain in handcuffs until he walked to the door of his cell and asked for their removal. On 8 March 2014 petitioner also ordered that Mr. Kerr should no longer be given milk, leaving Mr. Kerr with no way to drink any liquid unless he could use his handcuffed hands to drink from the sink in his cell.
>
> 4. Petitioner did not ensure that the custodial staff checked Mr. Kerr's condition, or that they removed the handcuffs periodically to allow Mr. Kerr to drink or to use the toilet in his cell. Mr. Kerr was not observed to be standing or to have moved from his bed after 8 March 2014.
>
> 5. No evidence was presented that Mr. Kerr had ever behaved violently towards custodial staff or that he presented a danger to petitioner or to other staff.
>
> 6. Petitioner had the authority to order the handcuffs removed. Procedures existed that would have reduced or eliminated any risk associated with removing Mr. Kerr's handcuffs.

> 7. Petitioner's action of allowing Mr. Kerr to remain in metal handcuffs for five days was not in accordance with DPS's or Alexander's guidelines for use of restraints.

Based on the evidence, the ALJ's findings of fact, and the undisputed crucial facts, we conclude that petitioner's actions of (1) allowing Mr. Kerr to remain lying on his bed in handcuffs for five days, (2) without receiving anything to drink during this time, and (3) without any attention to Mr. Kerr's condition, was a violation of applicable rules, a breach of petitioner's responsibility as a senior correctional officer, and contributed directly related to Mr. Kerr's death on 12 March 2014. The ALJ did not err by finding and concluding that respondent had properly determined that it had just cause to terminate petitioner for grossly inefficient job performance.

Petitioner's arguments for a contrary result are primarily technical in nature and ignore the degree of responsibility associated with his position. For example, petitioner argues that the ALJ did not make a finding tracking the statutory language that petitioner "failed to satisfactorily perform job requirements as specified in his job description, work plan, or as directed by management." We first note that as a Correctional Captain, petitioner was management. Secondly, the ALJ's findings establish that petitioner's acts and omissions meet the standard for grossly inefficient performance, and the ALJ's order need not be reversed for omitting an additional finding that tracks the statutory language.

Similarly, petitioner contends that the ALJ did not make a finding specifically quoting the definitional language that petitioner's "actions or inactions resulted in the creation of the potential for death or serious bodily injury to Inmate Kerr." The evidence was undisputed that at the time of Mr. Kerr's death he had been in handcuffs for days, with nothing to drink, was lying in his own urine and feces, and was determined to have died of dehydration. In the face of this overwhelming and disturbing evidence, petitioner nonetheless argues that respondent "failed to present sufficient evidence to establish such potential of serious bodily injury or death." We hold that the evidence and the ALJ's findings established not only a potential for serious injury or death but death itself.

Petitioner also contends that the "only specific findings that ALJ Brooks made that Petitioner failed to satisfactorily perform his job requirements were those relating to his failure to complete an incident report for the Code Blue incident and his failure to document that Inmate Kerr remained handcuffed at the end of his shift on his daily OIC report." Petitioner fails to acknowledge the most important "job requirement" of

his position, that of exercising good judgment in a supervisory position of great responsibility.

Petitioner also asserts that his conduct, even if it constituted grossly inefficient job performance, did not warrant dismissal. We again note that petitioner's position required him to exercise supervisory authority and good judgment. We conclude that the ALJ's findings support the conclusion that respondent had shown that it had just cause to terminate petitioner for grossly inefficient job performance.

We have considered petitioner's remaining arguments and conclude that they are without merit. For the reasons discussed above, we conclude that the ALJ did not err and that its order should be

AFFIRMED.

Judges BRYANT and CALABRIA concur.

TIMOTHY S. BOYD, PLAINTIFF
v.
GREGORY M. REKUC, M.D. AND RALEIGH ADULT MEDICINE, P.A., DEFENDANT

No. COA15-780

Filed 15 March 2016

Medical Malpractice—Rule 9 certification—voluntary dismissal and refiling of complaint

The trial court erred in its order dismissing plaintiff's medical malpractice complaint where plaintiff filed his original complaint within the applicable statute of limitations but without the required Rule 9(j) certification; plaintiff voluntarily dismissed his original complaint pursuant to Rule 41(a)(1) before any dismissal with prejudice occurred and refiled his complaint within the one year, as allowed under Rule 41; and plaintiff asserted that the required expert review had been done prior to the filing the original complaint.

Appeal by Plaintiff from order entered 12 January 2015 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 30 November 2015.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Patricia P. Shields and Joshua D. Neighbors, and Gaylord Rodgers, PLLC, by Daniel M. Gaylord, for the Plaintiff-Appellant.

Young Moore and Henderson, P.A., by Elizabeth Pharr McCullough and Kelly Street Brown, for the Defendants-Appellees.

Lincoln Derr PLLC, by Sara R. Lincoln and Lori R. Keeton for Amicus Curiae, North Carolina Association of Defense Attorneys.

The Law Office of D. Hardison Wood, by D. Hardison Wood and Reginald Mathis, for Amicus Curiae, North Carolina Advocates for Justice.

DILLON, Judge.

Timothy S. Boyd ("Plaintiff") appeals from the trial court's order dismissing his medical malpractice claims. For the following reasons, we reverse.

I. Background

Plaintiff's complaint asserts claims for medical malpractice against Defendants Gregory M. Rekuc, M.D., and Raleigh Adult Medicine, P.A., contending that Defendants' failure to provide him with up-to-date vaccinations proximately caused his suffering from a number of maladies. His action was dismissed because he did not file his complaint with the certification required by Rule 9(j) of the Rules of Civil Procedure within the applicable three (3) year statute of limitations. (Rule 9(j) requires essentially that a medical malpractice complaint asserts that an expert has reviewed the relevant medical care and medical records and is willing to testify that the medical care provided by the defendants did not comply with the applicable standard of care.) The dates relevant to this appeal are as follows:

On 16 March 2011, Plaintiff was last seen by Defendants.[1]

On 14 March 2014, Plaintiff filed a medical malpractice complaint against Defendants in a prior action, within the applicable three (3) year

1. Plaintiff claims that he was still under the care of Defendants as of 25 April 2011 when he was admitted to Wake Medical Center where he was diagnosed with his various maladies. However, for purposes of resolving this appeal, it does not matter whether the date Defendants last provided care was on 16 March or 25 April.

statute of limitations; however, his complaint did not comply with the Rule 9(j) certification requirements.

On 16 June 2014, Plaintiff voluntarily dismissed the prior action, pursuant to Rule 41 of the Rules of Civil Procedure.

On 14 July 2014, Plaintiff commenced this present action, filing a complaint *with* the required Rule 9(j) certification. Specifically, the complaint asserted, not only that the Rule 9(j) expert review occurred, but also that the expert review occurred *prior to 14 March 2014* (when the first complaint was filed).

On 12 January 2015, the trial court granted Defendants' motion to dismiss Plaintiff's complaint, concluding that the second complaint was not filed within the applicable statute of limitations. Plaintiff timely appealed.

II. Analysis

A. *Brisson* Controls Our Case

The only issue on appeal is whether the trial court correctly concluded that Plaintiff's second complaint was barred by the applicable statute of limitations. We hold that the trial court erred in its conclusion. Specifically, where a plaintiff voluntarily dismisses a medical malpractice complaint which was timely filed in good faith but which lacked a required Rule 9(j) certification, said plaintiff may re-file the action after the expiration of the applicable statute of limitations *provided that* (1) he files his second action within the time allowed under Rule 41 and (2) the new complaint asserts that the Rule 9(j) expert review of the medical history and medical care occurred prior to the filing of the original timely-filed complaint.

This case involves the interplay between Rule 9(j) and Rule 41(a)(1) of our Rules of Civil Procedure.

Rule 9(j) requires that a complaint alleging medical malpractice (where *res ipsa loquitur* does not apply) "shall be dismissed" *unless* the complaint specifically asserts that the relevant medical care and medical records have been reviewed by a qualified expert. N.C. Gen. Stat. § 1A-1, Rule 9(j) (2014). Rule 9(j) also provides that *prior to the expiration of the applicable statute of limitations*, a medical malpractice complainant may move the trial court for an order "to extend the statute of limitations for a period not to exceed 120 days . . . in order to comply with this Rule[.]" *Id.*

Rule 41(a)(1) allows a plaintiff to dismiss *any* action voluntarily prior to resting his case. *Id.* § 1A-1, Rule 41(a)(1). The Rule further provides essentially that, where the dismissed action was filed within the applicable statute of limitations, said plaintiff can commence a new action (based on the same claim) outside of the applicable statute of limitations so long as the new action is commenced *within one year* after the original action was dismissed. *See Brockweg v. Anderson*, 333 N.C. 486, 489, 428 S.E.2d 157, 159 (1993).

The relevant facts in the present case are essentially "on all fours" with our Supreme Court's 2000 opinion in *Brisson v. Santoriello*, 351 N.C. 589, 528 S.E.2d 568 (2000). In *Brisson*, the relevant timeline was as follows:

27 Jul 1994 – Alleged malpractice occurred (Three-year statute of limitations);

3 Jun 1997 – Complaint filed just within the applicable statute of limitations, *but without* the proper Rule 9(j) certification;

6 Oct 1997 – Plaintiff voluntarily dismisses the action pursuant to Rule 41;

9 Oct 1997 – A second action filed *with* Rule 9(j) certification. The certification asserted, not only that an expert review had occurred, but also that the review took place *prior to* the filing of the *original* complaint, though the certification was "inadvertently omitted from the [original complaint][.]" *Id.* at 592, 528 S.E.2d at 569.

Based on these facts, our Supreme Court held that the second action was not time-barred since it was filed within one year of the Rule 41(a)(1) voluntary dismissal. *Id.* at 597, 528 S.E.2d at 573. The Court stated that "[t]he only limitations are that the [voluntary] dismissal [of the first action] not be done in bad faith and that it be done prior to a trial court's ruling dismissing plaintiff's claim or otherwise ruling against plaintiff at any time prior to plaintiff resting his or her case at trial." *Id.* Therefore, *Brisson* essentially allows a plaintiff who has filed a defective medical malpractice complaint to voluntarily dismiss the action to gain a year to file a complaint which complies with Rule 9(j). Of note, the Court did not *expressly rely* in its holding on the fact that the second complaint asserted that the Rule 9(j) review had occurred prior to the filing of the original complaint.

The Supreme Court has clarified *Brisson* on three separate occasions of note; however, that Court has never overruled *Brisson*. Our Court has also commented on *Brisson* and Rule 9(j) on a number of occasions. The key cases from the past sixteen (16) years are discussed below, with an emphasis on the Supreme Court's holdings.

Essentially, the Supreme Court cases stand for the following: A medical malpractice complaint which fails to include the required Rule 9(j) certification is subject to dismissal with prejudice pursuant to Rule 9(j). Prior to any such dismissal, however, said plaintiff may amend or refile (pursuant to Rules 15 or 41, respectively) the complaint with the proper Rule 9(j) certification. Further, if such subsequent complaint is filed after the applicable statute of limitations has expired but which otherwise complies with Rule 15 or 41, the subsequent complaint is not time-barred *if* it asserts that the Rule 9(j) expert review occurred *before the original complaint was filed*.

2002: Supreme Court Opinion – *Thigpen v. Ngo*

The first occasion of note in which our Supreme Court addressed *Brisson* was in 2002 in *Thigpen v. Ngo*, 355 N.C. 198, 558 S.E.2d 162 (2002). Here, our Supreme Court held that if a complaint *which lacks the required Rule 9(j) certification* is amended pursuant to Rule 15 to include the certification, the amended complaint *will not relate back* to the original complaint (for statute of limitations purposes) *unless* the amended complaint asserts that the Rule 9(j) expert review occurred *prior* to the filing of the *original* complaint. *Id.* at 204, 558 S.E.2d at 166. *Thigpen* did not involve a Rule 41(a)(1) dismissal, thereby distinguishing that case from *Brisson*. The Court, though, did comment on *Brisson*, stating that a plaintiff who fails to include the Rule 9(j) certification could take a voluntary dismissal "to effectively extend the statute of limitations." *Id.* at 201, 558 S.E.2d at 164.

2004: Supreme Court Adopts Dissent from our Court in *Bass v. Durham County*

The second important Supreme Court decision was actually a short statement reversing an opinion of our Court "[f]or the reasons stated in the dissenting opinion[.]" *Bass v. Durham Cnty.*, 358 N.C. 144, 592 S.E.2d 687 (2004) (per curiam). *Bass* involved the interplay of the Rule 9(j) certification, Rule 9(j)'s 120-day extension provision and Rule 41(a)(1) with the following factual timeline:

Aug 1996 – Date of alleged malpractice (three-year statute of limitations);

Aug 1999 – Three years after the alleged malpractice, instead of filing a complaint, the plaintiff obtains 120-day extension from the trial court, as allowed by Rule 9(j);

2 Dec 1999 – On the 120th day from the extension order, the plaintiff files the complaint, but without the required Rule 9(j) certification;

13 Dec 1999 – After the 120-day extension expired, the plaintiff files an amended complaint *with* a Rule 9(j) certification;

29 May 2001 – Plaintiff voluntarily dismisses the complaint;

12 Jun 2001 – Plaintiff files a new action with a Rule 9(j) certification. However, the record on appeal reflects that the certification in this new complaint did *not* assert whether the Rule 9(j) expert review had occurred prior to the filing of the original complaint;

26 Oct 2001 – Trial court dismisses all of the plaintiff's claims.

On appeal, in a 2-1 decision, our Court reversed the trial court's dismissal, relying on *Brisson* to conclude that the 12 June 2001 complaint in the second action was not time-barred since Rule 41 can be used to cure the defects of a timely filed complaint. *Bass v. Durham Cnty.*, 158 N.C. App. 217, 222, 580 S.E.2d 738, 741 (2003), *rev'd*, 358 N.C. 144, 592 S.E.2d 687 (2004).

Judge Tyson, however, issued a dissenting opinion, *see* 158 N.C. App. at 223, 580 S.E.2d at 742 (Tyson, J., dissenting), which was adopted by the Supreme Court, *see* 358 N.C. 144, 592 S.E.2d 687 (2004). In his dissent, Judge Tyson concluded that the majority had misapplied *Brisson*. 158 N.C. App. at 223, 580 S.E.2d at 742. He concluded that *Thigpen*, in fact, controlled. *Id.* at 224-25, 580 S.E.2d at 743. Judge Tyson, though, never stated that the Supreme Court in *Thigpen* had overruled *Brisson*, but rather stated that the "[t]he facts of *Brisson* are distinguishable from the case at bar." *Id.* at 224, 580 S.E.2d at 743. Judge Tyson pointed out that the plaintiff in *Bass* did not file any complaint with the required Rule 9(j) certification until after the applicable statute of limitations had expired and the 120-day extension had run. *Id.* at 225, 580 S.E.2d at 743. Moreover, though not *expressly* mentioned by Judge Tyson, the record on appeal reveals that the plaintiff never stated that the Rule 9(j) expert review had occurred prior to the filing of his first complaint, instead

merely asserting that "[t]he medical care provided by Defendants has been reviewed by a person who is reasonably expected to qualify as an expert witness[.]" *Bass*, No. COA02-841, Record on Appeal at 15, 42. Therefore, just as in *Thigpen*, a certification in a new pleading which asserts that a Rule 9(j) expert review had been conducted does not relate back to a prior defective pleading where the new pleading fails to assert that the review took place before the filing of the original (defective) pleading.

In *dicta*, Judge Tyson noted that the second complaint in *Brisson* was filed, *not only* within the one-year period allowed for in Rule 41(a)(1), *but also* within 120 days of the expiration of the applicable statute of limitations, opining that the second complaint "would have been timely filed if plaintiffs had requested and received the 120-day extension." *Id.* at 224, 580 S.E.2d at 743.

2005-2010: Court of Appeal's Conflicting Interpretations of *Brisson*, *Thigpen*, and *Bass*

In 2005, Judge (now Justice) Jackson, writing for our Court, applied *Bass*, *Thigpen*, and *Brisson* to conclude essentially that a complaint with a Rule 9(j) certification did not relate back to a prior complaint which was voluntarily dismissed where the second complaint failed to assert that the Rule 9(j) expert review occurred prior to the filing of the first complaint. *In re Barksdale v. Duke Univ. Med. Ctr.*, 175 N.C. App. 102, 107-08, 623 S.E.2d 51, 55-56 (2005) (noting that the plaintiff had admitted that the expert review occurred "well after the filing of the initial complaint"). Specifically, Judge (now Justice) Jackson honed in on language from our Supreme Court in *Thigpen*, stating that the General Assembly intended for the expert review to be a prerequisite of filing a malpractice complaint and that "permitting [the] amendment of a complaint to add the expert certification where the expert review occurred after the suit was filed would conflict directly with the clear intent of the legislature." *Id.* at 107, 623 S.E.2d at 55 (quoting *Thigpen*, 355 N.C. at 203-04, 558 S.E.2d at 166).

In 2006, however, our Court issued an opinion which interpreted the interplay of *Brisson*, *Thigpen*, and *Bass* a little differently. *See Ford v. McCain*, 192 N.C. App. 667, 666 S.E.2d 153 (2008). Specifically, the *Ford* panel stated that Judge Tyson's *dicta* in *Bass* (referred to herein above) effectively limited *Brisson* to actions where the second complaint is filed *within 120 days* after the statute of limitations has expired, because Rule 9(j) otherwise allows a complainant to seek a

120-day extension of the statute of limitations. The *Ford* panel so held even though Rule 41 makes no mention of a 120-day timeframe and even though the plaintiff in *Brisson*, never sought a 120-day extension. *Id.* at 672 n. 1, 666 S.E.2d at 157 n. 1.[2]

2010: Our Supreme Court Speaks Again in *Brown v. Kindred Nursing*

In 2010, our Supreme Court, on the third (and most recent) occasion of note, commented on *Brisson* in the case of *Brown v. Kindred Nursing*, 364 N.C. 76, 82-83, 692 S.E.2d 87, 91 (2010). In *Brown*, the Supreme Court *reaffirmed* its holding in *Brisson*. *Id.* at 82, 692 S.E.2d at 91. The Court essentially reconciled *Brisson* with its other holdings in the same way Judge (now Justice) Jackson had done in *Barksdale*. *See id.* at 82-83, 692 S.E.2d at 91. Essentially, the Supreme Court stated that a complaint containing the required Rule 9(j) certification filed *after* the applicable statute of limitations has expired will relate back to a prior, voluntarily dismissed complaint *if* (1) the refiled complaint is filed within one year of the dismissal of the first complaint *and* (2) the refiled complaint states that the Rule 9(j) expert review took place *prior to* the filing of the *original* action. *See id.* Specifically, the Court stated that under *Brisson*, "Rule 9(j) does not prevent parties from voluntarily dismissing a nonconforming complaint and filing a new complaint with proper certification," emphasizing that "in *Brisson*, the plaintiffs had complied with every portion of Rule 9(j) except for including the certification in the [original] complaint." *Id.* at 82, 692 S.E.2d at 91. The Supreme Court did not state that *Brisson* only applied where the second action is filed within 120 days of the statute of limitations, rather than to all actions filed within one year of the dismissal of the prior complaint as allowed under Rule 41. Rather, under *Brown*, it appears that a plaintiff can utilize the entire year allowed for under Rule 41 to refile the action, provided that the new action asserts that the expert review occurred prior to the filing of the first action.

2011-2016: Decisions from the Court of Appeals

In 2011, our Court issued a decision, stating that "[b]ased on the facts of the instant case, *Brisson* was overruled by the Supreme Court in *Bass*." *McKoy v. Beasley*, 213 N.C. App. 258, 263, 712 S.E.2d 712, 717 (2011). This statement from our Court cannot stand for the proposition

2. Even assuming that *Brisson* only applies to second actions (commenced following a voluntary dismissal of a first action) filed within 120 days of the statute of limitations expiration, rather than all those filed within one year of the dismissal of the prior action as allowed under Rule 41, we note that, here, the second action was filed within 120 days of the expiration of the applicable statute of limitations.

that *Brisson* was overruled *in its entirety*, for such a reading would conflict with our Supreme Court's opinion in *Brown*. (Notably, our *McKoy* decision never mentions *Brown*.) In any event, the *McKoy* case involved a plaintiff who filed a wrongful death claim within the applicable statute of limitations but *without* a Rule 9(j) certification. After said action was dismissed without prejudice, the plaintiff filed a new action outside of the applicable statute of limitations which contained a Rule 9(j) certification. *Id.* at 260-61, 712 S.E.2d at 713-14. Though not expressly stated in the opinion, the record on appeal in *McKoy* reveals that the new complaint failed to state whether the Rule 9(j) expert review took place before the filing of the original action. *McKoy*, No. COA09-1315, Record on Appeal at 6-7. Furthermore, we believe that, for this reason, the holding in *Brisson* was not applicable to *McKoy*. That is, to the extent that *Brisson* could have been read to allow a Rule 41 dismissal to save *any* type of Rule 9(j) defect in a medical malpractice complaint (even where the plaintiff failed to have a medical review conducted prior to filing said complaint), *Brisson* had been "overruled" (or, more accurately, narrowed) by *Thigpen* and *Bass*: The extra time provided in Rule 41 to file a second action can only save an otherwise time-barred second complaint if the second complaint asserts that the expert review was conducted prior to the filing of the original complaint.[3]

As recently as January of this year (2016), our Court has acknowledged that *Brisson* remains good law, allowing "a 9(j) deficient complaint to be dismissed [pursuant to Rule 41] and then re-filed with a sufficient 9(j) statement within one year of dismissal." *Alston v. Hueske*, ___ N.C. App. ___, ___, 781 S.E.2d 305, 310-11 (2016).

B. Rule 9(j)'s 120-Day Extension Provision

Defendants make mention of Rule 9(j)'s provision allowing a plaintiff to seek from the trial court an order extending the statute of limitations by 120 days to allow the plaintiff additional time to comply with the requirements of the Rule. However, here, this provision does not come into play since Plaintiff never sought a 120-day extension of the statute of limitations. Further, though not relevant here, we point out that it is not entirely clear from case law whether a complaint is time-barred where it asserts that the expert review of the medical care and medical records occurred during a 120-day extension period granted by

3. There is language in *McKoy* which could be read to suggest that Rule 41 cannot be used even to save a defective complaint where the expert review had already occurred. However, such a reading would totally eradicate any precedential value of *Brisson* and be at odds with the reasoning in *Thigpen*.

the trial court, rather than asserting that the review occurred before the running of the original statute of limitations.

It could be argued from the text of the rule that the purpose of the 120-day extension is to allow a plaintiff additional time, *not only* to draft the required Rule 9(j) pleading *but also* to locate an expert to conduct the medical review, since the drafting of a pleading itself should not take that long if the review has, otherwise, already taken place. The Supreme Court in *Thigpen* suggested that the 120-day statute of limitations extension allows for the actual review to take place during this 120-day extension period. *Thigpen*, 355 N.C. at 203-04, 558 S.E.2d at 166 (stating that "[t]he legislature's intent was to provide a more specialized and stringent procedure for plaintiffs in medical malpractice claims through Rule 9(j)'s requirement of expert certification *prior to the filing of a complaint*" (emphasis added)).

However, the Supreme Court held in *Brown* by a 4-3 decision that the 120-day extension allowed under Rule 9(j) can only be used "for the limited purpose of filing a complaint. [It cannot be used] . . . to locate a certifying expert, add new defendants, and amend a defective pleading." 364 N.C. at 84, 692 S.E.2d at 92. In *Brown*, the plaintiff filed a defective complaint and then obtained a 120-day extension, during which he obtained a certifying expert and filed an amended complaint. *Id.* The dissent in *Brown* interpreted the majority's holding to apply to *any* situation where a 120-day extension was obtained, not just situations where the plaintiff has already filed a complaint prior to obtaining the 120-day extension to file an amended complaint. *Id.* at 90, 692 S.E.2d at 95-96 (Hudson, J., dissenting) (questioning the majority's reasoning that the purpose of providing for a 120-day extension was to allow a plaintiff an additional four (4) months merely to draft an appropriate Rule 9(j) statement).

In 2016, though, our Court, in *Alston*, interpreted *Brown* much more narrowly than suggested by the *Brown* dissent. That is, our Court stated that *Brown* prevents a plaintiff from utilizing a 120-day extension to locate a certifying expert *only if* he has already filed a defective complaint prior to obtaining the extension. *Alston*, ___ N.C. App. at ___, 781 S.E.2d at 309 (stating that "Rule 9(j) also provides an avenue to extend the statute of limitations in order to provide additional time, if needed, to meet the expert review requirement," but that the extension "may not be used to amend a previously filed complaint").

We need not resolve this question in this appeal, however, since the issue is not before us.

III. Conclusion

Based on our Supreme Court's holdings in *Brisson*, *Thigpen*, *Bass*, and *Brown*, we hold that the trial court erred in its order dismissing Plaintiff's complaint: Plaintiff filed his original complaint within the applicable statute of limitations. Though his original complaint was filed without the required Rule 9(j) certification and, therefore, subject to be dismissed with prejudice, *see* N.C. Gen. Stat. § 1A-1, Rule 9(j), Plaintiff voluntarily dismissed his original complaint pursuant to Rule 41(a)(1) before any such dismissal with prejudice occurred. He, then, refiled his complaint within the one year time period allowed under Rule 41, and asserted in said complaint that the expert review of his medical care and history had been conducted prior to the filing of the original complaint. Therefore, we reverse the order of the trial court dismissing Plaintiff's complaint and remand the matter for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge DAVIS concur.

CHRISTENBURY EYE CENTER, P.A., PLAINTIFF
v.
MEDFLOW, INC. AND DOMINIC JAMES RIGGI, DEFENDANTS

No. COA15-1120

Filed 15 March 2016

Appeal and Error—jurisdiction—appeal from Business Court

An appeal to the Court of Appeals from the Business Court was dismissed. Appeals from final judgments in the Business Court must be brought in the North Carolina Supreme Court.

Appeal by plaintiff from order and opinion entered 23 June 2015 by Judge James L. Gale in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 February 2016.

Shumaker, Loop & Kendrick, LLP, by Frederick M. Thurman, Jr., for plaintiff-appellant.

Robinson, Bradshaw & Hinson, P.A., by Fitz E. Barringer and Douglas M. Jarrell, for defendant-appellee Medflow, Inc.

Moore & Van Allen PLLC, by Benjamin P. Fryer and Nader S. Raja, for defendant-appellee Dominic James Riggi.

DAVIS, Judge.

Christenbury Eye Center, P.A. ("Christenbury") appeals from the trial court's order and opinion granting the motions of Medflow, Inc. ("Medflow") and Dominic James Riggi ("Riggi") (collectively "Defendants") to dismiss Christenbury's claims for breach of contract and unfair trade practices pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. After careful review, we dismiss Christenbury's appeal for lack of jurisdiction.

Factual Background

Christenbury is a professional association located in Charlotte, North Carolina that offers ophthalmology and ophthalmic services. Medflow is a software company that develops customized enhancements to medical records management software for medical practices and was formed by Riggi in January of 1999.

In late 1998 or early 1999, Christenbury hired Riggi to develop a customized medical records management software platform for use in its practice. Riggi subsequently formed Medflow, which worked with Christenbury to customize and enhance a platform to suit the practice's specific needs. Christenbury paid Medflow in excess of $200,000.00 for the completed software platform and retained all rights to the finished product.

On 20 October 1999, Christenbury and Medflow entered into a written Agreement Regarding Enhancements ("the Agreement") pursuant to which Christenbury agreed to assign its rights to the software platform and any subsequent enhancements made thereto by Medflow in exchange for (1) a ten percent royalty for all fees received in connection with the platform's resale; and (2) a minimum yearly royalty of $500.00 for the first five years after the Agreement was executed. The Agreement further obligated Medflow to "provide Christenbury with a written report on a monthly basis which will include a detailed description of

the fees received . . . during the prior month, along with payment to Christenbury of all corresponding fees due with respect to such charges for that prior month" and prohibited Medflow from selling the platform or any enhancements thereto in North Carolina or South Carolina without Christenbury's prior written consent.

On 22 September 2014, Christenbury filed a verified complaint in Mecklenburg County Superior Court against Medflow and Riggi alleging, *inter alia*, that they had breached the Agreement by further developing and reselling the platform to other ophthalmological practices without paying any royalties to Christenbury. On 29 October 2014, an order was entered designating the case as a mandatory complex business case in accordance with N.C. Gen. Stat. § 7A-45.4(b), and the case was assigned to the Honorable James L. Gale of the North Carolina Business Court ("the Business Court").

On 21 November 2014, Riggi filed a motion to dismiss Christenbury's complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief could be granted. Medflow filed a similar motion to dismiss on 1 December 2014.

A hearing on Defendants' motions was held before Judge Gale on 5 March 2015. On 23 June 2015, Judge Gale entered an order and opinion granting Defendants' motions and dismissing Christenbury's action with prejudice. Christenbury filed a written notice of appeal on 16 July 2015.

Analysis

Before we can address the merits of the substantive issues raised by Christenbury, we must first determine whether we possess jurisdiction over the appeal. *See Hyatt v. Town of Lake Lure*, 191 N.C. App. 386, 390, 663 S.E.2d 320, 322 (2008) ("If an appealing party has no right of appeal, an appellate court on its own motion should dismiss the appeal even though the question of appealability has not been raised by the parties themselves." (citation, quotation marks, and brackets omitted)). For the reasons set out below, we conclude that we lack jurisdiction over this appeal.

In 2014, our General Assembly enacted Chapter 102 of the 2014 North Carolina Session Laws, which, among other things, amended N.C. Gen. Stat. § 7A-27 so as to provide a direct right of appeal to the Supreme Court from a final judgment of the Business Court. *See* 2014 N.C. Sess. Laws 621, 621, ch. 102, § 1. N.C. Gen. Stat. § 7A-27(a)(2) now provides, in pertinent part, as follows:

> (a) Appeal lies of right *directly to the Supreme Court* in any of the following cases:
>
> . . . .
>
> (2) From any final judgment in a case designated as a mandatory complex business case pursuant to G.S. 7A-45.4 . . . .

N.C. Gen. Stat. § 7A-27(a)(2) (2015) (emphasis added).

This statutory provision clearly mandates that appeals from final judgments[1] rendered in the Business Court be brought in the North Carolina Supreme Court and not in this Court.[2] Therefore, the only remaining question is whether the 2014 amendments to N.C. Gen. Stat. § 7A-27(a)(2) apply to the present appeal.

The effective date of the 2014 amendments to N.C. Gen. Stat. § 7A-27(a)(2) was 1 October 2014. *See* 2014 N.C. Sess. Laws 621, 629, ch. 102, § 9 ("Section 1 of this act becomes effective October 1, 2014, and applies to actions designated as mandatory complex business cases on or after that date."). The present case was designated as a mandatory complex business case on 29 October 2014. Therefore, this case is, in fact, governed by the 2014 amendments to N.C. Gen. Stat. § 7A-27(a)(2). Accordingly, we lack jurisdiction over Christenbury's appeal, and as a result, the appeal must be dismissed. *See Hous. Auth. of City of Wilmington v. Sparks Eng'g, PLLC*, 212 N.C. App. 184, 187, 711 S.E.2d 180, 182 (2011) ("A jurisdictional default precludes the appellate court from acting in any manner other than to dismiss the appeal." (citation, quotation marks, and ellipses omitted)).

Conclusion

For the reasons stated above, this appeal is dismissed.

DISMISSED.

Judges ELMORE and HUNTER, JR. concur.

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1. N.C. Gen. Stat. § 7A-27(a), as amended, also provides that certain interlocutory orders entered by the Business Court are likewise directly appealable to the Supreme Court. N.C. Gen. Stat. § 7A-27(a)(3).

2. We note that N.C. Gen. Stat. § 7A-27 was amended once again in 2015. *See* 2015 N.C. Sess. Laws 166, 166, ch. 264, § 1.(b). However, the 2015 amendments have no bearing on the jurisdictional issue currently before us.

IN RE BALLARD

[246 N.C. App. 241 (2016)]

IN RE FORECLOSURE OF REAL PROPERTY UNDER DEED OF TRUST FROM JAMES K. BALLARD AND NAOMI S. BALLARD, IN THE ORIGINAL AMOUNT OF $430,000.00, PAYABLE TO CHASE MANHATTAN MORTGAGE CORPORATION, DATED JUNE 30, 2003 AND RECORDED ON JULY 7, 2003 IN BOOK 1459 AT PAGE 1402, IREDELL COUNTY REGISTRY TRUSTEE SERVICES OF CAROLINA, LLC, SUBSTITUTE TRUSTEE

No. COA15-475

Filed 15 March 2016

Mortgages—foreclosure—default—resale—forfeiture of bid deposit

The trial court did not err by ordering that the bid deposit of the defaulting winning bidder (Abtos) at an initial foreclosure sale be disbursed to U.S. Bank where Abtos contended that the resale had not met statutory requirements. The alleged procedural error was that U.S. Banks' opening bid at the resale was less than its opening bid at the original sale. There was no authority to support Abtos's position that the amount of a party's opening bid constitutes a "procedure" of the resale.

Appeal by Abtos, LLC from order entered on 28 October 2014 by Judge Tanya T. Wallace in Superior Court, Iredell County. Heard in the Court of Appeals on 7 October 2015.

Moffatt & Moffatt, PLLC, by Tyler R. Moffatt, for appellant Abtos, LLC.

The Law Office of John T. Benjamin, Jr., P.A., by John T. Benjamin, Jr. and Benjamin W. Smith, for appellee U.S. Bank National Association.

Brock & Scott, PLLC, by Franklin L. Greene, for appellee Trustee Services of Carolina, LLC.

STROUD, Judge.

Abtos, LLC ("Abtos") appeals an order in which the trial court ordered that Abtos's bid deposit be disbursed to U.S. Bank National Association ("U.S. Bank"). Abtos argues that the trial court erred because Trustee Services of Carolina, LLC ("the substitute trustee") failed to conduct a foreclosure resale in accordance with N.C. Gen. Stat. § 45-21.30(c) (2013). Finding no error, we affirm.

I Background

On 12 February 2013, the substitute trustee filed and served a notice of hearing upon James K. Ballard and Naomi S. Ballard, notifying them that the Clerk of Superior Court would conduct a hearing to determine whether the substitute trustee could exercise its power to foreclose on their real property pursuant to a deed of trust. *See* N.C. Gen. Stat. § 45-21.16 (2013). On 8 October 2013, the substitute trustee filed and served an amended notice of hearing. On 27 November 2013, the Clerk of Superior Court held a hearing and entered an order allowing the substitute trustee to proceed with the foreclosure sale. On 27 November 2013, the substitute trustee gave notice of the foreclosure sale. On 27 December 2013, at the initial foreclosure sale, U.S. Bank, as trustee for J.P. Morgan Mortgage Trust 2006-A2, the holder of the deed of trust and the indebtedness secured thereby, made an opening bid of $424,263.20.[1] But Abtos made the winning bid of $424,264.20 and deposited $21,213.21 with the Clerk of Superior Court. On or about 9 January 2014, the substitute trustee requested that Abtos pay the remaining amount of its bid by 31 January 2014.

On 24 April 2014, after Abtos defaulted on its bid, the substitute trustee moved to allow the resale of the property. *See* N.C. Gen. Stat. § 45-21.30(c). On 24 April 2014, the Clerk of Superior Court granted the substitute trustee's motion and ordered a resale. On 7 May 2014, the substitute trustee gave notice of the resale. On 12 June 2014, at the resale, U.S. Bank made the winning bid of $400,300.00.

On 29 July 2014, Abtos moved to recover its bid deposit. On 19 August 2014, after a hearing, the Clerk of Superior Court denied Abtos's motion and ordered that Abtos's bid deposit be disbursed to U.S. Bank. *See* N.C. Gen. Stat. § 45-21.30(d) ("A defaulting bidder at any sale or resale or any defaulting upset bidder is liable on his bid, and in case a resale is had because of such default, he shall remain liable to the extent that the final sale price is less than his bid plus all the costs of the resale. Any deposit or compliance bond made by the defaulting bidder shall secure payment of the amount, if any, for which the defaulting bidder remains liable under this section."). On 28 August 2014, Abtos gave notice of appeal to the Superior Court. On 28 October 2014, after a hearing, the trial court entered an order affirming the Clerk of Superior Court's order. On 19 November 2014, Abtos gave timely notice of appeal to this Court.

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1. We do not find evidence of U.S. Bank's opening bid in the record, but the parties do not dispute the fact that U.S. Bank made this opening bid.

II. Order to Disburse Bid Deposit

A. Standard of Review

"Issues of statutory construction are questions of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

B. Analysis

Abtos's sole argument on appeal is that the trial court erred in disbursing its bid deposit to U.S. Bank because the substitute trustee failed to conduct the resale in accordance with N.C. Gen. Stat. § 45-21.30(c), which provides:

> When the highest bidder at a sale or resale or any upset bidder fails to comply with his bid upon tender to him of a deed for the real property or after a bona fide attempt to tender such a deed, the clerk of superior court may, upon motion, enter an order authorizing a resale of the real property. *The procedure for such resale shall be the same in every respect as is provided by this Article in the case of an original sale of real property* except that the provisions of G.S. 45-21.16 are not applicable to the resale.

N.C. Gen. Stat. § 45-21.30(c) (emphasis added).

Abtos argues that the "procedure for [the] resale" was not the same as the original sale, because U.S. Bank's opening bid in the resale was $400,300.00, or $23,963.20 less than its opening bid in the original sale. *See id.* But Abtos cites no authority, nor do we find any, to support its position that the amount of a party's opening bid constitutes a "procedure" of the resale. *See id.* Given the vagaries of the real estate market, it would indeed seem strange to bind a party to the amount of its opening bid in a previous sale. Nor does Abtos make any argument that the actual "procedure for [the] resale" was different from the procedure of the original sale. *See id.*

In addition, we note that in *In re Foreclosure of Allan & Warmbold Constr. Co.*, the noteholder bid $388,534.99 for two parcels of land, but a real estate broker filed an upset bid in the amount of $408,034.99. *In re Foreclosure of Allan & Warmbold Constr. Co.*, 88 N.C. App. 693, 694-95, 364 S.E.2d 723, 724, *disc. review denied*, 322 N.C. 480, 370 S.E.2d 222 (1988). The real estate broker later moved to withdraw his bid "upon the ground that it was made in the mistaken belief that the property being

sold included" a third parcel "on which twelve specifically numbered condominium units [were] situated[.]" *Id.*, 364 S.E.2d at 724. The trial court allowed the real estate broker to withdraw his bid and ordered a resale of the foreclosed property. *Id.* at 695, 364 S.E.2d at 724. "In reselling the two tracts of land[,] the trustee refused to start with the [noteholder's original] bid of $388,534.99, as the [mortgagors] demanded[.]" *Id.*, 364 S.E.2d at 724. The noteholder made the only bid of $280,500.00, and the trial court confirmed the resale. *Id.*, 364 S.E.2d at 724. The mortgagors appealed arguing that the trial court should have enforced the noteholder's original bid. *Id.* at 698, 364 S.E.2d at 726. This Court rejected the mortgagors' argument noting that "it is inherent in selling land to the last and highest bidder that the acceptance of a higher bid, which creates a conditional contract, releases the lower bid previously accepted." *Id.*, 364 S.E.2d at 726. This Court thus affirmed the trial court's decision to confirm the resale. *Id.*, 364 S.E.2d at 726.[2] The fact that this Court rejected the mortgagors' argument that the trial court should have enforced the noteholder's original bid, which was $108,034.99 more than its winning bid in the resale, provides additional support to our holding that a party's choice to lower its opening bid in a resale does not violate N.C. Gen. Stat. § 45-21.30(c). Accordingly, we hold that the trial court did not err in ordering that Abtos's bid deposit be disbursed to U.S. Bank.[3]

III. Conclusion

For the foregoing reasons, we affirm the trial court's order.

AFFIRMED.

Judges STEPHENS and DAVIS concur.

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1. But this Court reversed the trial court's decision to allow the real estate broker to withdraw his bid and remanded the case to the trial court "for the entry of a judgment establishing the amount [the real estate broker] is indebted to the trustee." *Id.*, 364 S.E.2d at 726.

2. On appeal, the substitute trustee requests that we award it "the costs incurred in this action, including its reasonable attorneys' fees[.]" Because the substitute trustee does not provide any authority or argument in support of its request, we hold that it has abandoned this issue. *See* N.C.R. App. P. 28(b)(6).

MEADOWS v. MEADOWS

[246 N.C. App. 245 (2016)]

MELISSA ALLISON MEADOWS, Plaintiff-Appellee
v.
BEN JAMIN HOWARD MEADOWS, II, Defendant-Appellant
v.
GLORIA MEADOWS, Intervenor

No. COA15-527

Filed 15 March 2016

1. Child Visitation—findings of fact—supported judgment

Where the trial court's custody order gave primary legal and physical custody of defendant's (the father's) toddler to plaintiff (the mother) and gave defendant very limited visitation rights, the Court of Appeals overruled defendant's argument that the two of the trial court's findings of fact were not supported by competent evidence. Even assuming both findings were not supported, the remaining findings were sufficient to support the trial court's judgment.

2. Child Visitation—findings of fact—child pornography allegations—refusal to answer questions or present evidence

Where the trial court's custody order gave primary legal and physical custody of defendant's (the father's) toddler to plaintiff (the mother) and gave defendant very limited visitation rights, the Court of Appeals rejected defendant's argument that the trial court erred by failing to make sufficient, detailed findings of fact resolving the issues surrounding allegations that he was viewing and storing child pornography on his computer. Defendant refused to answer any questions regarding the allegations in his deposition, and he failed to testify or present any evidence regarding the allegations at the hearing. The trial court's inability to determine defendant's fitness as a parent was an adequate basis for its ruling.

3. Child Visitation—limited visitation—child pornography allegations—refusal to answer questions or present evidence—inability to determine parent's fitness

Where the trial court's custody order gave primary legal and physical custody of defendant's (the father's) toddler to plaintiff (the mother) and gave defendant very limited visitation rights, the Court of Appeals rejected defendant's argument that the trial court erred by denying him reasonable visitation without finding that he was unfit to visit the child. Defendant refused to answer any questions regarding the allegations in his deposition, and he failed to testify or

present any evidence regarding the allegations at the hearing. The trial court did not err by making its visitation determinations based upon its inability to determine defendant's fitness as a parent.

4. Child Visitation—clerical error in visitation schedule—remanded

Where the trial court's custody order gave primary legal and physical custody of defendant's (the father's) toddler to plaintiff (the mother) and gave defendant very limited visitation rights, the Court of Appeals remanded the matter for the limited purpose of correcting a clerical error in the visitation schedule.

Appeal by defendant from order entered 16 September 2014 by Judge Carolyn J. Yancey in Granville County District Court. Heard in the Court of Appeals 3 November 2015.

Batten Law Firm, P.C., by Holly W. Batten, for plaintiff-appellee.

Dunlow & Wilkinson, P.A., by John M. Dunlow, for defendant-appellant.

No brief for Intervenor.

CALABRIA, Judge.

Ben Jamin Meadows ("defendant") appeals from an initial custody order awarding primary and legal custody of Billy[1] to Melissa Allison Meadows ("plaintiff") and supervised visitation to defendant. We affirm.

I. Background

Plaintiff and defendant (collectively, "the parties") were married on 6 October 2007. The parties had one child, Billy, born on 30 September 2011. Defendant's mother, Gloria Meadows ("Intervenor") provided substantial assistance in caring for Billy for extended periods of time while plaintiff dealt with certain mental health issues. After the parties separated on 14 January 2013, plaintiff and Billy lived with plaintiff's parents and continued living with plaintiff's parents through the custody and visitation hearings, which concluded on 5 August 2014.

Plaintiff filed a complaint on 14 January 2013 for post-separation support, alimony, child custody, child support, and equitable

1. A pseudonym is used to protect the minor's identity.

distribution. On 22 January 2013, the parties agreed in a memorandum of order that plaintiff would have temporary custody and defendant would have supervised visitation of Billy. Intervenor filed an amended motion for intervention to "pursue a custody claim for the minor child, or in the alternative, a claim for grandparent visitation."[2] In another memorandum of order that modified the prior order, defendant was to have supervised visitation with Billy for up to two hours each week at the Supervised Visitation Center in Burlington, North Carolina.

Following hearings, the trial court entered an order on 16 September 2014 giving, *inter alia*, "primary legal and physical custody" of Billy to plaintiff, and limiting defendant's visitation rights to "supervised visitation at the [Family Abuse Services center ("FAS")] in Burlington, North Carolina every other Sunday for up to two (2) hours." The trial court's unchallenged findings of fact relevant to this appeal are as follows:

> 38. The minor child herein is a well-adjusted toddler with normal ailments as well as normal physical and emotional development.
>
> 39. During his infancy years to current date, the minor child has been surrounded by family who love and care for him. As reasonably expected during Plaintiff's manic episodes, this same family came together to "assist" in caring for the minor child. Their effort is a testament of love and support rather than attempt to alienate the minor child from either parent.
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> 40. During the entire trial, the Defendant did not appear nor did he provide any sworn testimony as to his own fitness and best interests of the minor child herein.
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> 41. . . . . The Defendant's legal counsel has had ample opportunity, however, [to] develop testimony and evidence throughout these proceedings via Plaintiff's and Intervenor's cases-in-chief. . . . [T]he [c]ourt was still left without sufficient evidence of the Defendant's character, temperament and abilities to support and care for the minor child herein.
>
> 42. At best attempt to deduce any evidence as to Defendant's parenting abilities, the [c]ourt considered the verified pleadings of his own mother, the Intervenor[,]

2. Intervenor is not involved in this appeal.

wherein she alleged and subsequently testified about a period of time when "That Defendant fully acquiesced in Intervenor's care of Little [Billy] and deferred principal caregiving duties for the child to Intervenor." Within the same pleadings, the Intervenor alleged that her son was "immature" and unable to adequately care for the minor child herein.

43. Otherwise, the [c]ourt cannot assume facts not in evidence of his fitness and ability to care for this toddler beyond the existing "temporary" supervised visitation schedule and how the Defendant interacts under strict guidelines of a visitation agency such as FAS.

. . . .

45. When Plaintiff separated from Defendant, Plaintiff hired Derek Ellington with Ellington Forensics, Inc. to inspect the parties' computer and other hard drives for evidence of [Defendant's] infidelity.

46. Mr. Ellington regularly reviews photos and other data images and is bound by N.C.G.S. § 66-67.4, which requires any processor of photograph images or any computer technician who, within the person's scope of employment, observes an image of a minor or a person who reasonably appears to be a minor engaging in sexual activity shall report the name and address of the person requesting the processing of the film or owner of the computer to the Cyber Tip Line at the National Center for Missing and Exploited Children or to the appropriate law enforcement official in the county in which the image or film was submitted.

47. After reviewing the content and data on one of the hard drives, Mr. Ellington contacted Plaintiff's counsel, and Plaintiff's counsel contacted Creedmoor Police Department.

48. After reviewing a small sample of the images on the hard drives, Detective Ricky Cates of the Creedmoor Police Department issued a search warrant to seize the computer and hard drives.

49. During his deposition on June 19, 2013, the Defendant was specifically asked certain questions by Plaintiff's

counsel regarding images on the computer and other hard drives seized by the police, including questions about creating pornographic images of children, and Defendant refused to answer any of the questions pertaining to that subject during . . . Defendant's [d]eposition[].

50. Intervenor does not believe that Defendant has an issue with child pornography and stated during her deposition and under oath during her testimony herein that "She would not believe it even if someone told her."

51. Despite the [c]ourt's previous instructions to supervise the visits between the Defendant and minor child, Intervenor admittedly did not follow the [c]ourt's directive. Her actions under the circumstances demonstrated inconsistency with her verified pleadings of "abandonment, neglect and unfitness" as it relates to Defendant.

52. The [c]ourt makes the determination that a psychological evaluation of the Defendant is necessary before unsupervised visitation occurs. The evaluation/examination should include the [c]ourt's entire record for examination by a licensed psychologist.

53. Pursuant to a Memorandum of Judgment/Order entered on April 16, 2013 the Defendant was allowed certain visitation periods with the minor child that were to be supervised by and occur at the Family Abuse Services center (hereinafter FAS) in Burlington, Alamance County, North Carolina[.]

54. In the interim, the [c]ourt makes the determination that pending the [c]ourt's receipt of Defendant's evaluation results, supervised visitation periods should continue at FAS.

55. The [c]ourt makes the determination that the supervised visitation schedule as provided in the April 16, 2013 Memorandum of Judgment/Order provides reasonable visitation privileges for the Defendant absent any evidence regarding his parenting abilities beyond the said pre-existing temporary arrangements.

Based upon these findings, the trial court concluded in relevant part:

3. It is in the best interest of the minor child herein that his primary legal and physical custody be with the Plaintiff.

> 4. The Defendant is entitled to access and reasonable visitation with his minor child unless this [c]ourt finds Defendant has forfeited the privilege by his conduct or unless the exercise of that privilege would injuriously affect the welfare of the child. *In re Custody of Stancil*, 10 N.C. App[.] 545, 179 S.E.2d 844 (1971).

Based upon these findings and conclusions, the trial court ordered in relevant part:

> 1. Primary legal and physical custody of the minor child . . . is hereby placed with Plaintiff subject to supervised visitation with the Defendant herein.
>
> 2. The Defendant shall exercise supervised visitation at the FAS in Burlington, North Carolina every other Sunday for up to two (2) hours.
>
> 3. The Intervenor shall exercise visitation at such time as the Plaintiff deems appropriate. Otherwise, Intervenor's claims for custody and/or visitation are hereby dismissed and denied.
>
> 4. The Defendant shall attend and successfully complete a mental health evaluation and follow any and all recommendations from said evaluation. Further, a licensed psychologist shall assess among other things, the Defendant's parenting abilities. The [c]ourt's future review and/or consideration of the Defendant's increased visitation shall require the [c]ourt's receipt and review of the Defendant's psychological report and parenting assessment.
>
> 5. While Plaintiff's allegations of inappropriate conduct by the Defendant, specifically child pornography, were not substantiated herein[,] the [c]ourt hereby orders a complete forensic evaluation of the offer of proof regarding criminal investigations and material recovered from the Defendant's computer. The outcome of said evaluation shall be a necessary condition of any pleading to modify the supervised visitation herein.

Defendant appeals.

II. Analysis

On appeal, defendant contends the trial court erred by (1) failing to "make detailed findings of fact to resolve a material, disputed issue

raised by the evidence;" (2) determining that defendant "failed to offer any direct competent evidence for the court's consideration;" and (3) denying defendant "reasonable visitation with [defendant's] minor child without finding that [defendant] was an unfit person to visit with the child or that such visitation would injuriously affect the welfare of the child." We disagree.

A. Standard of Review

As an initial matter, "[t]he welfare of the child has always been the polar star which guides the courts in awarding custody." *Pulliam v. Smith*, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998) (citation omitted). "Any order for custody shall include such terms, including visitation, as will best promote the interest and welfare of the child." N.C. Gen. Stat. § 50-13.2(b) (2015). Further:

> It is well settled that the trial court is vested with broad discretion in child custody cases. The decision of the trial court should not be upset on appeal absent a clear showing of abuse of discretion. "Findings of fact by a trial court must be supported by substantial evidence." Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." "A trial court's findings of fact in a bench trial have the force of a jury verdict and are conclusive on appeal if there is evidence to support them." However, the trial court's conclusions of law must be reviewed *de novo*.

McConnell v. McConnell, 151 N.C. App. 622, 626, 566 S.E.2d 801, 804 (2002) (internal citations omitted). Unchallenged findings of fact are binding on appeal. *Thomas v. Thomas*, __ N.C. App. __, __, 757 S.E.2d 375, 378 (2014) (citation omitted).

In the conclusion of defendant's brief, defendant purports to be challenging the trial court's findings of fact #40, #41, #42, #43, #44, #52, #54, and #55. However, defendant only specifically argued in the body of his brief that findings of fact #41 and #44 were unsupported by competent evidence. The remaining findings that defendant did not specifically argue lacked evidentiary support have been abandoned and are binding on appeal. *See In re P.M.*, 169 N.C. App. 423, 424, 610 S.E.2d 403, 404-05 (2005) (deeming findings of fact binding, although specifically challenged on appeal, because the party abandoned her appeal of those findings by "fail[ing] to specifically argue in her brief that [the findings] were unsupported by evidence"); *see also* N.C.R. App. P. 28(b)(6) (2015)

("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

B. Findings of Fact Unsupported by Evidence

[1] Defendant contends that two of the trial court's findings of fact are not supported by competent evidence. Specifically, defendant argues that there was no competent evidence to support the portion of finding of fact #41 that states: "While [defendant's] attendance [at the hearing] was not required by any statute or legal argument to the [c]ourt, he failed to offer any direct competent evidence for the [c]ourt's consideration[,]" and finding of fact #44, which states: "Other than the information provided about his participation in visitation under supervised conditions, the [c]ourt has not received any competent evidence as to his parental abilities, responsibilities, and best interest of the minor child as it relates to the minor child herein."

In the instant case, defendant did offer competent evidence by introducing testimony by Jennifer Stillman, Program Coordinator with FAS, as well as by introducing the records and notes from FAS relating to defendant's interaction with Billy. According to this evidence, defendant acted appropriately when interacting with Billy and never violated any FAS guidelines during supervised visitation. In addition, defendant was deposed, and his deposition was admitted into evidence. Although defendant never personally appeared at the hearing, he did offer competent evidence by way of Stillman's testimony, the FAS records, and his deposition.

However, even assuming, *arguendo*, that both findings are not supported by competent evidence, it is of no consequence to the instant case. The remaining binding findings of fact, cited above, are sufficient to support the trial court's judgment and for our review of defendant's additional arguments. *See In re Custody of Stancil*, 10 N.C. App. 545, 549, 179 S.E.2d 844, 847 (1971) ("Immaterial findings of fact are to be disregarded." . . . . "It is sufficient if enough [m]aterial facts are found to support the judgment."). Therefore, we overrule defendant's argument.

C. Failure to Resolve Material, Disputed Issues Raised by the Evidence

[2] Defendant contends that the trial court erred by failing to make sufficient, detailed findings of fact resolving the issues raised by the evidence of whether child pornography was found on defendant's computer. We disagree.

As defendant correctly points out,

> a custody order is fatally defective where it fails to make detailed findings of fact from which an appellate court can determine that the order is in the best interest of the child, and custody orders are routinely vacated where the "findings of fact" consist of mere conclusory statements that the party being awarded custody is a fit and proper person to have custody and that it will be in the best interest of the child to award custody to that person. A custody order will also be vacated where the findings of fact are too meager to support the award.

Dixon v. Dixon, 67 N.C. App. 73, 76-77, 312 S.E.2d 669, 672 (1984) (citations omitted). Defendant contends that the 16 September 2014 order did not resolve the issues surrounding allegations that defendant was viewing and storing child pornography on his computer.

In *Dixon*, this Court addressed a somewhat analogous situation as follows:

> Plaintiff testified that defendant had started abusing the child when it was an infant, that he once observed her jabbing the child's buttocks with a diaper pin, and several times returned home from work to find defendant beating their child. Two former baby-sitters for the child gave testimony relating to the defendant's abuse of her child, and both of defendant's parents testified that defendant was too strict with her son, although they denied ever having seen evidence of mistreatment. According to a letter to the court from the Onslow County Department of Social Services, which letter evaluated each parent's fitness for custody, the department had received three child abuse reports on the defendant, two of which were substantiated.
>
> The only findings of fact potentially addressing the defendant's tendency to corporally punish her child in an abusive way is the finding that defendant enrolled in two courses designed to improve her knowledge and understanding of how to cope with physiological, psychological, nutritional and medical problems associated with child rearing, and further findings that defendant stated she now uses "less force" in dealing with her son, and that she intends to continue whatever further training might be necessary to make her a better mother.

Id. at 78, 312 S.E.2d at 672-73. The *Dixon* Court then reasoned:

> Any evidence of child abuse is of the utmost concern in determining whether granting custody to a particular party will best promote the interest and welfare of the child, and it is clear that the findings of fact at bar do not adequately resolve the issue of child abuse raised by the evidence in the record. We do not here imply that the evidence establishes that defendant is currently abusing her child, nor do we hold that any evidence of child abuse means that the abusing parent has permanently forfeited any right to ever gain custody. We do hold, however, that the nature of child abuse, it being such a terrible fate to befall a child, obligates a trial court to resolve any evidence of it in its findings of fact. This was not done and the order is therefore vacated and the case remanded for a new hearing on the issue of custody.

Id. at 78-79, 312 S.E.2d at 673. When making custody determinations, it is imperative that a trial court makes sufficient findings of fact concerning issues related to the health and safety of the children involved. Whether a parent is viewing and storing child pornography, akin to whether a parent is physically abusive, is certainly critical to a trial court's determination of whether to grant custody to a particular party and is of the utmost concern to the health and safety of a child in that parent's control.

There are, however, major differences among the facts in *Dixon* and the facts in the instant case. In *Dixon*, the trial court *awarded custody of the child to the person accused of the abuse* and made no findings directly addressing the accusations of abuse. *Id.* at 75, 312 S.E.2d at 671. In the instant case, the trial court did *not* award custody, or even unsupervised visitation, of Billy to the parent accused of the inappropriate conduct, and the trial court directly addressed the issue of the child pornography allegations. The trial court found that, because defendant refused to answer questions related to those allegations in his deposition, and because he failed to testify or present any other evidence relevant to those allegations at the hearing, the trial court had insufficient evidence from which to make a determination. Because the trial court did not have all the information it required, due in part to defendant's decision not to fully participate in the proceedings, the trial court continued to limit defendant's visitation with the child to supervised visits at FAS. The trial court clearly stated that it would revisit its imposition of limited supervised visitation once defendant obtained a full "psychological report and parenting assessment," and when the

trial court obtained a "complete forensic evaluation of the offer of proof regarding criminal investigations and material recovered from . . . [d]efendant's computer[.]"

Furthermore, although "[a custody order] must resolve the material, disputed issues raised by the evidence," *Carpenter v. Carpenter*, 225 N.C. App. 269, 273, 737 S.E.2d 783, 787 (2013), "[a] trial court's inability to determine the fitness of a parent is an adequate basis for not awarding custody to that parent." *Qurneh v. Colie*, 122 N.C. App. 553, 558, 471 S.E.2d 433, 436 (1996). The trial court's findings of fact were sufficiently detailed regarding the allegations of defendant's use and possession of child pornography, based upon the evidence the trial court had before it. *Id.* at 76-77, 312 S.E.2d at 672. These findings are sufficient for our review of the trial court's best interests determination. *Id.* Therefore, we overrule defendant's challenge.

D. Denial of Reasonable Visitation

[3] Defendant contends the trial court erred in "denying [him] reasonable visitation with the . . . child without finding that [he] was an unfit person to visit with the child or that such visitation would injuriously affect the welfare of the child." We disagree.

N.C. Gen. Stat. § 50-13.5(i) (2015) states:

> In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.

This Court has reasoned:

> The right of visitation is an important, natural and legal right, although it is not an absolute right, but is one which must yield to the good of the child. A parent's right of access to his or her child will ordinarily be decreed unless the parent has forfeited the privilege by his conduct or unless the exercise of the privilege would injuriously affect the welfare of the child, for it is only in exceptional cases that this right should be denied. But when it is clearly shown to be best for the welfare of the child, either parent may be denied the right of access to his or her own child.

Stancil, 10 N.C. App. at 550, 179 S.E.2d at 848 (citation omitted). Defendant argues that the trial court failed to find either that he had forfeited his rights to unsupervised visitation, or that unsupervised visits would not be in Billy's best interest. For this reason, defendant contends, the trial court was without authority to impose the restrictions on his visitation that were included in the 16 September 2014 order. However, this Court has recognized that refusal by a parent to provide information that is necessary for a trial court to make custody-related determinations can serve as a basis to deny that parent certain rights.

In *Qurneh v. Colie*, this Court addressed the impact of a natural parent invoking his Fifth Amendment right against self-incrimination in the context of a custody hearing:

> The privilege against self-incrimination is intended to be a shield and not a sword. Here, the plaintiff attempted to assert the privilege as both a shield and a sword.
>
> In an initial custody hearing, it is presumed that it is in the best interest of the child to be in the custody of the natural parent if the natural parent is fit and has not neglected the welfare of the child. Plaintiff sought to take advantage of this presumption by introducing evidence of his fitness. *See Wilson v. Wilson*, 269 N.C. 676, 677, 153 S.E.2d 349, 351 (1967) (holding that in order to be entitled to this presumption, the natural parent must make a showing that he or she is fit). However, when the defendant sought to rebut this presumption by questioning the plaintiff regarding his illegal drug activity, the plaintiff asserted his fifth amendment privilege. To allow plaintiff to take advantage of this presumption while curtailing the opposing party's ability to prove him unfit would not promote the interest and welfare of the child. N.C. Gen. Stat. § 50-13.2(a)(1995).

122 N.C. App. 553, 558, 471 S.E.2d 433, 436 (1996) (some citations omitted). The *Qurneh* Court went on to hold:

> In a related argument, plaintiff contends that the trial court improperly concluded that it could not determine plaintiff's fitness. *A trial court's inability to determine the fitness of a parent is an adequate basis for not awarding custody to that parent.* In this State, evidence of a parent's prior criminal misconduct is relevant to the question of the parent's fitness. Due to the plaintiff's refusal

> to answer questions regarding illegal drug use, trafficking and other drug involvement, the trial court was unable to consider pertinent information in determining plaintiff's fitness. As a policy matter, issues such as custody should only be decided after careful consideration of all pertinent evidence in order to ensure the best interests of the child are protected. Plaintiff's decision not to answer certain questions relating to his past illegal drug activity by invoking his fifth amendment privilege prevented the court from determining his fitness and necessitated the dismissal of his claim.

Id. at 558-59, 471 S.E.2d at 436 (citations omitted) (emphasis added).

In the instant case, as in *Qurneh*, defendant is attempting to use his unwillingness to provide certain evidence to the trial court, mainly through his refusal to testify regarding the child pornography allegations, as a means of attacking the lack of such evidence to support the order. We hold that the trial court did not err in making its visitation determinations based upon its inability to determine defendant's fitness as a parent. *Id.* We again note that the trial court has clearly stated in its order that it will revisit the issue of visitation once defendant has obtained a psychological evaluation and a parenting assessment, and once the court obtains the results of "a complete forensic evaluation of the offer of proof regarding criminal investigations and material recovered from [d]efendant's computer." Therefore, defendant's argument is overruled.

E. Correction of Clerical Error

[4] Defendant contends the trial court erred by reducing his supervised visitation privileges to a greater degree than those privileges that the parties agreed to in the 16 April 2013 memorandum order. Specifically, defendant challenges the trial court's finding of fact #55, which provided that "the supervised visitation schedule as provided in the April 16, 2013 Memorandum of Judgment/Order provides reasonable visitation privileges for [defendant]," and its corresponding order that defendant "shall exercise supervised visitation at the FAS in Burlington . . . every other Sunday for up to two (2) hours."

The 16 April 2013 visitation schedule provided for "supervised visitation for up to two hours each week[.]" Those visits were ordered "every other Sunday and every other Thursday so that [defendant] has up to two hours each week." In its finding of fact #55, the trial court

determined that this schedule provided reasonable visitation for defendant. However, the trial court ordered in the decretal portion of its order that defendant "shall exercise supervised visitation at the FAS in Burlington, North Carolina every other Sunday for up to two (2) hours." Because we can discern no reason why the trial court would restrict defendant's visitation schedule any further, we assume this item in the decretal portion of the trial court's order was a clerical error. Therefore, we remand this portion of the order for the limited purpose of correcting this error.

III. Conclusion

The trial court properly entered an initial custody order awarding primary and legal custody of Billy to plaintiff and supervised visitation to defendant, until such time as the court is able to gather more evidence of defendant's parenting abilities.

First, even if the findings of fact challenged by the defendant were unsupported by competent evidence, those findings were immaterial in light of the remaining findings that were binding on appeal. Second, the trial court's findings of fact relating to the issue of child pornography were sufficiently detailed based upon the incomplete evidence presented to the trial court, due in part to defendant's inability to participate in the proceedings. Although the issue of defendant allegedly viewing and storing child pornography certainly is critical in determining Billy's best interest, resolution of this issue was not possible because the investigation was incomplete and defendant refused to testify. The resolution of the issues raised by the allegations of child pornography were not required prior to the trial court granting primary custody to plaintiff and continued *supervised* visitation to defendant. Third, while defendant was not required to attend the custody hearings, the trial court had authority to base its custody determination in part on its inability to determine defendant's fitness as a parent, which was caused by defendant's failure to participate fully in the proceedings and, specifically, defendant's refusal to answer questions regarding the allegations of child pornography.

Significantly, the trial court invited defendant to return to court for a modification of the initial custody order once it was able to gather more evidence of defendant's character, temperament, and ability to support and care for Billy. Defendant's modification depends upon his completion of a mental health evaluation and a parenting assessment. Another condition for the modification is a forensic evaluation of the offer of proof regarding the criminal investigations of child pornography

and related material recovered from defendant's computer. We affirm the trial court's initial custody order and remand for the limited purpose of correcting a clerical error in its order to reflect the correct supervised visitation schedule of 16 April 2013.

AFFIRMED; REMANDED FOR CORRECTION OF CLERICAL ERROR.

Judges BRYANT and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
MALCOLM SINCLAIR BLUE, DEFENDANT

No. COA15-837

Filed 15 March 2016

1. Satellite Based Monitoring—reasonableness—motion to stay hearing—pre-appeal

Rule 62(d) of the N.C. Rules of Civil Procedure, which allows an appellant to obtain a stay of execution when an appeal is taken, did not apply where defendant was convicted of second-degree rape, a hearing was held to determine whether he should be subject to lifetime satellite monitoring, and defendant moved for a stay until a ruling came down on the reasonableness of monitoring as a search.

2. Satellite Based Monitoring—viewed as search—reasonableness

The trial court erred by failing to conduct the appropriate analysis and exercise its discretion where defendant was convicted of second-degree rape, the trial court held a hearing to determine whether defendant should be subject to lifetime satellite monitoring, and defendant moved for a stay until a ruling came down on the reasonableness of the monitoring as a search. The trial court failed to follow the mandate of the Supreme Court of the United States to determine, based on the totality of the circumstances, whether the Satellite Based Monitoring program was reasonable when viewed as a search.

Appeal by defendant from Order entered 6 April 2015 by Judge C. Winston Gilchrist in Harnett County Superior Court. Heard in the Court of Appeals 13 January 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph Finarelli, for the State.

Meghan Adelle Jones for defendant.

ELMORE, Judge.

Malcolm Sinclair Blue (defendant) appeals from the trial court's order requiring him to enroll in Satellite-Based Monitoring (SBM) and to register as a sex offender for his natural life. After careful review, we reverse and remand.

I. Background

In 2006, the North Carolina General Assembly established a sex offender monitoring program that uses a continuous satellite-based monitoring system to monitor three categories of sexual offenders. N.C. Gen. Stat. § 14-208.40 *et seq.* (2015). For nearly a decade, the SBM program survived constitutional challenges. *See, e.g.*, *State v. Bowditch*, 364 N.C. 335, 352, 700 S.E.2d 1, 13 (2010) ("[S]ubjecting defendants to the SBM program does not violate the Ex Post Facto Clauses of the state or federal constitution."); *State v. Martin*, 223 N.C. App. 507, 509, 735 S.E.2d 238, 239 (2012) ("[O]ur Supreme Court considered the fact that offenders subject to SBM are required to submit to visits by DCC personnel and determined that this type of visit is not a search prohibited by the Fourth Amendment."); *see also State v. Jones*, 231 N.C. App. 123, 127, 750 S.E.2d 883, 886 (2013) ("The context presented in the instant case—which involves a civil SBM proceeding—is readily distinguishable from that presented in [*United States. v. Jones*]" "where the Court held that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search' within the meaning of the Fourth Amendment.") (citing *United States v. Jones*, 565 U.S. ___, 181 L. Ed. 2d 911 (2012)), *abrogated by Grady v. North Carolina*, 575 U.S. ___, 191 L. Ed. 2d 459 (2015).

In *State v. Grady*, No. COA13-958, 2014 WL 1791246 (N.C. Ct. App. May 6, 2014), *appeal dismissed, review denied*, 367 N.C. 523, 762 S.E.2d 460 (2014), *cert. granted, judgment vacated*, 575 U.S. ___, 191 L. Ed. 2d 459 (2015), this Court, relying on *State v. Jones*, overruled the defendant's argument that "SBM required him to be subject to an ongoing search of his person." The North Carolina Supreme Court denied review, and the Supreme Court of the United States granted *certiorari*. *Grady v. North Carolina*, 575 U.S. ___, 191 L. Ed. 2d 459 (2015). On 30 March 2015, the Court held in a *per curiam* opinion that North Carolina's SBM

program "effects a Fourth Amendment search." *Id.* at ___, 191 L. Ed. 2d at ___.

The Court stated, "That conclusion, however, does not decide the ultimate question of the program's constitutionality. The Fourth Amendment prohibits only *unreasonable* searches. The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Id.* at ___, 191 L. Ed. 2d at ___. The Court, acknowledging the stated "civil nature" of the program, explained, "It is well settled . . . that the Fourth Amendment's protection extends beyond the sphere of criminal investigations, *Ontario v. Quon*, 560 U.S. 746, 177 L. Ed. 2d 216 (2010), and the government's purpose in collecting information does not control whether the method of collection constitutes a search." *Grady*, 575 U.S. at ___, 191 L. Ed. 2d at ___ (internal quotations omitted). Ultimately, the case was remanded to the New Hanover County Superior Court to determine if, based on the above framework, the SBM program is reasonable.

In the case *sub judice*, defendant pleaded guilty to second-degree rape in May 2006, and the trial court sentenced him to 80 to 105 months imprisonment. After defendant completed his sentence, the Harnett County Superior Court held a Determination Hearing on 6 April 2015 to decide if defendant shall register as a sex offender and enroll in SBM for his natural life. During the hearing, the following colloquy took place:

> THE COURT: Okay. Reading between the lines—I'll be glad to hear you, Mr. Jones, but I assume your position is that satellite-based monitoring program is unreasonable search or seizure under 4th Amendment, and that issue not having been decided by the state courts yet?
>
> MR. JONES: That's correct, your Honor. What I would ask your Honor is to stay making any ruling on this, based on *Grady v. North Carolina* . . . . If you read the last paragraph, it says the North Carolina courts did not examine whether the state's monitoring program is reasonable when properly viewed as a search and will not do so in this first instance. . . . Your Honor, what I think, from reading that case, the only judicially efficient thing to do is stay these cases until you get that ruling because they are now saying it is a search. Our Supreme Court said it was a civil matter. . . . So we ask your Honor to stay this until we get some type of ruling from either our Supreme Court, the

United States Supreme Court, or maybe possibly the attorney general's office, how they are going to proceed in this.

. . . .

THE COURT: . . . State want to be heard any further or offer any evidence?

MR. BAILEY: Well, can I address Mr. Jones's comments, your Honor?

THE COURT: You certainly can. Let me tell you what I am inclined to do. I understand the *Grady* case says, at least I think I do, *Grady* case does not strike down the satellite-based monitoring system that the General Assembly has passed in North Carolina. It simply says that such a program is a search of the person, which seems logical. Of course, it says some corollary things as well, but it does not strike down the statute. So what I am inclined to do is, consistent with the existing state of North Carolina law, which is binding on me, I'm inclined to order the lifetime monitoring. Clearly under the existing law, this is an aggravated offense. Obviously, if the courts strike the program down, it would invalidate this Court's order, but I think it's incumbent upon me at this point in time to follow the law in this state as I understand it to be if there is no federal law overriding those decisions or invalidating the satellite-based monitoring statute in North Carolina. So that's my inclination. Anything else the State wants to be heard about?

MR. BAILEY: No, sir.

MR. JONES: I would ask, your Honor, state at this time, because we're opposing the satellite-based monitoring, is that the State needs to put on some evidence to show that it's reasonable and that it complies with the constitution, based on *Grady v. North Carolina*. We would like to have some type of evidentiary hearing because my client is not agreeing to be placed on satellite-based monitoring.

THE COURT: Well, do you have any witnesses that you want to call or any evidence that you want to offer beyond a reasonable doubt, beyond the file, beyond the fact that his conviction beyond a reasonable doubt is second-degree rape?

> MR. BAILEY: I don't have any other evidence to offer, Judge Gilchrist. . . .
>
> THE COURT: Okay.
>
> MR. JONES: We're objecting to its constitutionality based on this, your Honor.
>
> . . . .
>
> THE COURT: Okay. All right. Well, Court finds satellite-based monitoring is required in this case for the lifetime of the defendant and orders the same. Defendant's objections and exceptions are noted for the record. Court specifically finds that it has taken into consideration that the imposition of lifetime satellite-based monitoring constitutes a search or seizure of the defendant under the 4th Amendment to the United States constitution and equivalent provisions under the state constitution. Court finds that such search and seizure is reasonable. Court finds the defendant has been convicted beyond a reasonable doubt of second-degree rape. Based upon that conviction, and upon the file as a whole, lifetime satellite-based monitoring is reasonable and necessary and required by the statute. The State request any further findings or conclusions?
>
> MR. BAILEY: I don't, your Honor.

The Honorable C. Winston Gilchrist ordered defendant to register as a sex offender and enroll in SBM for his natural life. Defendant gave oral notice of appeal, filed written notice of appeal on 16 June 2015, and filed a petition for writ of *certiorari*, which we granted on 30 December 2015.

II. Analysis

Defendant's argument is twofold: "The trial court failed to exercise its discretion and therefore erred as a matter of law in denying [defendant's] request for a stay, in light of *Grady v. North Carolina*[;]" and "the trial court erred in concluding that continuous [SBM] is reasonable and a constitutional search under the Fourth Amendment in the absence of any evidence from the State as to reasonableness."

[1] First, defendant argues that because "SBM is a civil, regulatory scheme subject to the rules applicable to other civil matters," the trial court had discretion to enter a stay. On appeal, defendant maintains that the trial court erred in failing to exercise discretion under Rule 62(d) of our Rules of Civil Procedure. At the hearing, counsel for defendant

requested that the court "stay making any ruling on this," "stay these cases until you get that ruling," "stay this until we get some type of ruling," "stay it," and "stay them all." Per the plain language of Rule 62(d), "[w]hen an appeal is taken, the appellant may obtain a stay of execution." N.C. Gen. Stat. § 1A-1, Rule 62 (2015). Accordingly, it would not have applied to stay defendant's SBM hearing. Defendant presents no other authority on why the trial court erred in denying his request.

[2] Second, defendant argues, "Determining the reasonableness of a search requires detailed analysis of the nature and purpose of the search and the privacy expectations at stake." He claims that the trial court's analysis was conclusory and was based upon no findings as to the reasonableness of the search. Defendant argues, "It was the State's burden to prove by a preponderance of the evidence that the challenged search was reasonable and constitutional[,]" yet the State presented no evidence.

The State denies that it has the burden of proving the reasonableness of SBM because SBM is a "civil, regulatory scheme." Thus, the State argues, "Defendant became a movant seeking a declaration that the search imposed by SBM is unreasonable and in violation of the Fourth Amendment and, so, voluntarily assumed the burden of proof. *See*, *e.g.*, N.C.G.S. § 1A-1, Rule 56(a)[.]" The State, however, concedes the following:

> If this Court concludes that the State bears the burden of proving the reasonableness of the search imposed by satellite-based monitoring, the State agrees with Defendant that the trial court erred by failing to conduct the appropriate analysis. As a result, this case should be remanded for a new hearing where the trial court will be able to take testimony and documentary evidence addressing the "totality of the circumstances" vital in an analysis of the reasonableness of a warrantless search[.]

As the State notes in its concession above, the trial court erred by failing to conduct the appropriate analysis. Regardless of who has the burden of proof, the trial court did not analyze the "totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady*, 575 U.S. at ___, 191 L. Ed. 2d at ___. Rather, the trial court simply acknowledged that SBM constitutes a search and summarily concluded it is reasonable, stating that "[b]ased upon [the second-degree

rape] conviction, and upon the file as a whole, lifetime satellite-based monitoring is reasonable and necessary and required by the statute."

Accordingly, the trial court failed to follow the mandate of the Supreme Court of the United States and determine, based on the totality of the circumstances, if the SBM program is reasonable when properly viewed as a search. *Grady*, 575 U.S. at ___, 191 L. Ed. 2d at ___; *see Samson v. California*, 547 U.S. 843, 848, 165 L. Ed. 2d 250, 256 (2006) ("Whether a search is reasonable is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.") (internal quotations and citations omitted); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53, 132 L. Ed. 2d 564, 574 (1995).

On remand, we conclude that the State shall bear the burden of proving that the SBM program is reasonable. *State v. Wade*, 198 N.C. App. 257, 270, 679 S.E.2d 484, 492 (2009) ("Warrantless searches are presumed to be unreasonable and therefore violative of the Fourth Amendment of the United States Constitution.") (citing *State v. Logner*, 148 N.C. App. 135, 139, 557 S.E.2d 191, 194 (2001)).

III. Conclusion

We reverse the trial court's order and remand for a new hearing in which the trial court shall determine if SBM is reasonable, based on the totality of the circumstances, as mandated by the Supreme Court of the United States in *Grady v. North Carolina*, 575 U.S. ___, 191 L. Ed. 2d 459 (2015).

REVERSED AND REMANDED.

Judges STROUD and DIETZ concur.

STATE OF NORTH CAROLINA
v.
LARRY COOK, DEFENDANT

No. COA15-278

Filed 15 March 2016

1. Constitutional Law—effective assistance of counsel—concession of guilt—scope of defendant's consent

A defendant charged with first-degree murder had effective assistance of counsel where his counsel's statement that he was not advocating that the jury find defendant not guilty did not exceed the scope of defendant's consent.

2. Constitutional Law—effective assistance of counsel—counsel's statement—defendant's crimes horrible

Defendant had effective assistance of counsel where his counsel told the jury that defendant's crimes were horrible but that their decision should be based on mental capacity and not the gravity of the crimes. Moreover, there was no reasonable probability of a different outcome otherwise.

3. Appeal and Error—preservation of evidence—hearsay objection—apparent in context

A hearsay objection was preserved for appeal where it was apparent when viewed in context.

4. Evidence—hearsay—state-of-mind exception

Testimony was admissible under the state-of-mind-exception where the victim's statement that she "was scared of" defendant unequivocally demonstrated her state of mind and was highly relevant to show the status of her relationship with defendant on the night before she was killed. Even assuming error, defendant failed to demonstrate that the alleged error prejudiced him.

Appeal by defendant from judgment entered on 23 May 2014 by Judge A. Moses Massey in Superior Court, Guilford County. Heard in the Court of Appeals on 23 September 2015.

Attorney General Roy A. Cooper III, by Special Deputy Attorney General David P. Brenskelle, for the State.

Michael E. Casterline, for defendant-appellant.

STROUD, Judge.

Larry Cook ("defendant") appeals from a judgment entered on a jury verdict finding him guilty of first-degree murder. Defendant argues that (1) his trial counsel rendered ineffective assistance of counsel; and (2) the trial court erred in admitting hearsay testimony of the victim's sister. We find no error.

I. Background

In 2007, defendant approached Brittney Turner ("the victim") at a bus stop and offered to give her money for lunch. Brittney accepted, and the two began a romantic relationship which lasted for the next five years. Brittney allowed defendant to borrow her car until 15 August 2012, when the car overheated while defendant was driving it. While Brittney was at work, defendant and another man attempted to fix the car at the house of Brittney's mother, Pamela Turner, but they were unsuccessful. Pamela and Daisha Turner, the victim's sister, dropped off defendant at his residence at a motel. That night, while Pamela was at work, Brittney and Daisha stayed at Pamela's house. During this time, defendant made numerous threatening phone calls to Brittney, and Brittney told Daisha that she was afraid of defendant.

The next morning, defendant repeatedly called Pamela to tell her that he was hungry. After Brittney and Pamela had run some errands, Brittney, Pamela, Daisha, and John Turner,[1] Daisha's four-year-old son, drove to defendant's residence at the motel to deliver some groceries and the clothes that defendant had left in Brittney's car. After Pamela parked the car, Brittney grabbed defendant's clothes, walked alone to defendant's door, and knocked on his door. Defendant opened the door and, without warning, began repeatedly stabbing Brittney in the neck with a screwdriver and a knife. Pamela and Daisha immediately ran to Brittney's aid. Defendant stabbed Pamela in the neck while Brittney and Daisha ran toward the motel lobby. Defendant chased Brittney into the motel lobby and continued stabbing her there. Pamela and Daisha again ran to Brittney's aid. Defendant stabbed Pamela in her abdomen twice and stabbed Daisha in her neck while Brittney ran to the highway to stop a car for help. After Brittney stopped a car on the highway, she collapsed, succumbing to her numerous injuries. During these events, John was running around in the motel parking lot. While Pamela grabbed John

1. We use a pseudonym to protect the identity of the juvenile.

and placed him back in her car, defendant walked up to her car, slit her tires, and broke her car windows and then walked back up to his room.

On 1 October 2012, a grand jury indicted defendant for first-degree murder and two counts of assault with a deadly weapon with intent to kill inflicting serious injury. *See* N.C. Gen. Stat. §§ 14-17, -32(a) (2011). Before trial, defendant admitted that he had killed Brittney Turner and was culpable for "some criminal conduct" during an inquiry pursuant to *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986). At trial, both Pamela Turner and Daisha Turner testified, and the State proffered video recordings of defendant's attack, taken from the motel's surveillance system. On 23 May 2014, the jury convicted defendant of first-degree murder under theories of both premeditation and deliberation and felony murder. The jury also convicted defendant of assault with a deadly weapon with intent to kill inflicting serious injury with respect to Pamela Turner and assault with a deadly weapon inflicting serious injury with respect to Daisha Turner. The trial court sentenced defendant to life imprisonment without parole for the first-degree murder conviction and arrested judgment on defendant's other convictions. Defendant gave timely notice of appeal.

II. Ineffective Assistance of Counsel ("IAC")

Defendant argues that his trial counsel rendered ineffective assistance of counsel, because in closing argument, his trial counsel (1) stated that he was not advocating that the jury find defendant not guilty; and (2) "repeatedly emphasiz[ed] the dreadfulness of the crime[s]."

A. Concession of Guilt

[1] Defendant argues that his trial counsel's statement in closing argument that he was not advocating that the jury find defendant not guilty exceeded the scope of the consent he gave during the *Harbison* inquiry. "[I]neffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507-08.

In *Harbison*, the defendant, who was charged with murder, "steadfastly maintained that he acted in self-defense" throughout the trial. *Id.* at 177, 337 S.E.2d at 506. But in closing argument, his counsel, without his knowledge or consent, "express[ed] his personal opinion that [the defendant] should not be found innocent but should be found guilty of manslaughter." *Id.*, 337 S.E.2d at 506. Our Supreme Court held that trial counsel had rendered *per se* ineffective assistance of counsel for the following reason:

> [T]he gravity of the consequences demands that the decision to plead guilty remain in the defendant's hands. When counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of guilty without the client's consent. Counsel in such situations denies the client's right to have the issue of guilt or innocence decided by a jury.

Id. at 180, 337 S.E.2d at 507.

Similarly, in *State v. Matthews*, in closing argument, the defendant's trial counsel argued that the jury "ought not to even consider" acquitting the defendant but that they should find the defendant guilty of second-degree murder. *State v. Matthews*, 358 N.C. 102, 106, 591 S.E.2d 535, 539 (2004). The defendant moved for appropriate relief based on ineffective assistance of counsel, but the trial court denied the motion, because it concluded that the "defendant [had] implicitly allowed his trial counsel to concede his guilt" by consenting to his counsel's overall trial strategy "to convince the jury that [the] defendant was guilty of something other than first degree murder" and because his IQ was high. *Id.* at 105-08, 538-40. Our Supreme Court disagreed with the trial court and held:

> For us to conclude that a defendant permitted his counsel to concede his guilt to a lesser-included crime, the facts must show, at a minimum, that defendant *knew* his counsel were going to make such a concession. Because the record does not indicate defendant *knew* his attorney was going to concede his guilt to second-degree murder, we must conclude defendant's attorney made this concession without defendant's consent, in violation of *Harbison*.

Id. at 109, 591 S.E.2d at 540.

In contrast, in *State v. McNeill*, the defendant stipulated in writing that he "did inflict multiple stab wounds" on the victim and that "these wounds caused her death." *State v. McNeill*, 346 N.C. 233, 237, 485 S.E.2d 284, 286 (1997) (brackets omitted), *cert. denied*, 522 U.S. 1053, 139 L. Ed. 2d 647 (1998). The trial court conducted a *Harbison* inquiry and determined that the defendant had "knowingly, voluntarily, and understandingly consented to the stipulation[.]" *Id.* at 238, 485 S.E.2d at 287. In closing argument, the defendant's counsel argued that "this is not a case of first degree murder; it's a case of second degree murder," and that counsel "has the permission of [the] defendant to tell you that he's guilty

of second degree murder." *Id.* at 237, 485 S.E.2d at 286 (brackets omitted). The defendant on appeal argued that his trial counsel had rendered ineffective assistance of counsel under *Harbison*, because his "stipulation was not intended to be a concession to second-degree murder." *Id.*, 485 S.E.2d at 286. Our Supreme Court rejected the defendant's argument and distinguished *Harbison*:

> *Harbison* is distinguishable. Significantly, there the defendant claimed self-defense. By contrast, defendant here stipulated in writing to having stabbed the victim and proximately caused her death. Second-degree murder is the unlawful killing of another human being with malice but without premeditation and deliberation. The intent necessary to support a conviction for second-degree murder is the intent to inflict the wound which produces the homicide. Indeed, malice is presumed where the defendant intentionally assaults another with a deadly weapon, thereby causing the other's death. The stipulation defendant entered concedes each of these elements and therefore supports a verdict of second-degree murder. In arguing in accord with defendant's stipulation, defense counsel cannot be said to have rendered ineffective legal assistance.

Id. at 237-38, 485 S.E.2d at 287 (citations omitted). Our Supreme Court concluded: "Where, as here, a defendant stipulates to the elements of an offense, defense counsel may infer consent to admit defendant's guilt of that offense." *Id.* at 238, 485 S.E.2d at 287.

Similarly, here, the trial court conducted the following *Harbison* inquiry:

> THE COURT: . . . .
>
> Your lawyer, Mr. Carpenter, has indicated this morning that in his—in jury selection that he intends to concede or admit in front of the jury that, if I understood him correctly—
>
> And please don't hesitate to interrupt me, Mr. Carpenter, if I say something that indicates to you that I misunderstood what you were saying.
>
> —but as I understand it, [defendant], your lawyer is intending to *admit during jury selection that you killed*

[*the victim*], and I don't know if he's going to go into—if he'll—during jury selection what questions might arise about lack of mental capacity, but with the understanding that the defense, then, during the case will be that you lacked the mental capacity to form the intent to premeditate and to deliberate, and, therefore, you would not be guilty of first degree murder. Is this—has Mr. Carpenter discussed with you this strategy?

DEFENDANT: Yes, sir.

THE COURT: And do you agree with it?

DEFENDANT: Yes, sir.

THE COURT: Do you understand that, even if Mr. Carpenter recommends this, that you're not bound by his recommendation? Do you understand that if you feel that nothing should be admitted that Mr. Carpenter would not be allowed to admit anything, that that's your—ultimately, you—I encourage you to have considered the advice of your lawyer, but do you understand ultimately that is your decision and your decision alone as to whether any element of any crime is admitted to the jury? Do you understand that?

DEFENDANT: Yes, sir.

THE COURT: And have you given your consent and do you still give your consent for your lawyer to make that admission before the jury during opening statements and/or during jury selection?

DEFENDANT: Yes, sir.

THE COURT: Do you understand that if he makes that admission that it makes it very likely that the jury may find you guilty of some offense?

DEFENDANT: Yes, sir.

THE COURT: Thank you, [defendant]. You may be seated.

Based upon my inquiry of [defendant], I find as a fact and conclude as a matter of law that [*defendant*] *has knowingly, intelligently, and voluntarily, and with full*

> *knowledge and awareness of the possible consequences, agreed and consented to a trial strategy whereby his attorney, Mr. Carpenter, acknowledges the defendant's culpability for some criminal conduct in the actions now on trial, and that* [*defendant*] *has made this decision after having been fully advised and* [*apprised*] *of the possible consequences of such a strategy.*

(Emphasis added.)

In closing argument, defendant's counsel stated:

> With the mental health issues that we presented to you, ladies and gentlemen, today, *are we saying to you that* [*defendant*] *committed no crime and he should somehow walk, or something to that effect? Absolutely not.*
>
> On a charge of first-degree murder, you'll also receive a second charge of second-degree murder, also a very serious felony charge. Those will be the two charges for your consideration for the homicide.

(Emphasis added.)

Like in *McNeill*, defendant here "knowingly, intelligently, and voluntarily, and with full knowledge and awareness of the possible consequences" admitted that he had killed the victim and that he had "culpability for some criminal conduct[.]" *See id.* at 237-38, 485 S.E.2d at 286-87. Defendant's counsel's trial strategy was to convince the jury that defendant lacked the mental capacity necessary for premeditation and deliberation and was therefore not guilty of first-degree murder. Defendant's counsel called only two witnesses, both of whom were psychologists and testified as expert witnesses. The first expert witness opined that defendant suffered from a mild neurocognitive disorder, and the second expert witness opined that defendant "lacked the mental capacity to consider the consequences of his behavior when he killed [the victim.]" By admitting that he killed the victim and that he was guilty of "some criminal conduct[,]" defendant conceded that he was guilty of a homicide offense. *See id.* at 238, 485 S.E.2d at 287 ("Where, as here, a defendant stipulates to the elements of an offense, defense counsel may infer consent to admit defendant's guilt of that offense.").

Defendant responds that although he acknowledged that he had "culpability for some criminal conduct[,]" he did not specifically admit that he was guilty of second-degree murder. But defendant's trial counsel did not argue that defendant was guilty of second-degree murder;

rather, defendant's trial counsel stated that he was not advocating that the jury find defendant not guilty. At first blush, this distinction may seem to be too fine a point given that second-degree murder and first-degree murder were the only homicide offenses submitted to the jury. But defendant never requested that any other homicide offense be submitted to the jury. On appeal, defendant argues that the evidence supported a conviction of voluntary manslaughter. But defendant does not argue that the trial court erred in failing to submit a jury instruction on the lesser offense of voluntary manslaughter, nor does defendant argue that his trial counsel rendered ineffective assistance of counsel by not requesting this instruction. Defendant admitted that he had killed the victim and that he was culpable "for some criminal conduct[,]" and in closing argument, defendant's trial counsel stated that he was not advocating that the jury find defendant not guilty. Accordingly, we hold that defendant's trial counsel did not argue beyond the scope of defendant's concession of guilt.

We note that in *McNeill*, the defendant's stipulation that he "did inflict multiple stab wounds" on the victim and that "these wounds caused her death" is very similar to defendant's concession here, and our Supreme Court held that that stipulation conceded each of the elements of second-degree murder. *See id.* at 237-38, 485 S.E.2d at 286-87 (brackets omitted).

Defendant also argues that the facts here are analogous to the facts in *Harbison* and *Matthews*. *See Harbison*, 315 N.C. at 177-78, 337 S.E.2d at 506; *Matthews*, 358 N.C. at 106-09, 591 S.E.2d at 539-40. But we distinguish *Harbison* and *Matthews*, because in both of those cases, the defendant never expressly consented to any concession of guilt, but here the trial court conducted an inquiry and concluded that defendant "knowingly, intelligently, and voluntarily, and with full knowledge and awareness of the possible consequences" admitted that he had killed the victim and was culpable "for some criminal conduct[.]" *See Harbison*, 315 N.C. at 177-78, 337 S.E.2d at 506; *Matthews*, 358 N.C. at 106-09, 591 S.E.2d at 539-40. Following *McNeill*, we hold that defendant's trial counsel did not deprive defendant of effective assistance of counsel by stating in closing argument that he was not advocating that the jury find defendant not guilty. *See McNeill*, 346 N.C. at 237-38, 485 S.E.2d at 286-87.

B. Emphasis of Dreadfulness of Crimes

[2] Defendant next argues that his trial counsel rendered ineffective assistance of counsel by "repeatedly emphasizing the dreadfulness of the crime[s]" in closing argument. Defendant characterizes his trial

counsel's emphasis as a Harbison violation, because his trial counsel's statements exceeded the scope of the consent he gave during a *Harbison*-like inquiry in which he consented to his trial counsel describing the video recordings of the crimes as "very graphic and very upsetting."

In closing argument, defendant's trial counsel argued:

> We talked about the surveillance video during jury selection. We talked about how graphic it would be. It was horrible. It was scary. No human being should ever have to go through what any of the people who were there went through, especially [the victim]. There's no disputing that. But a trial is not a popularity contest. It's not about who you like or don't like. It's not about emotions. It's not about who your heart goes out for.
>
> This trial's not about whether or not what [defendant] did on August 16th, 2012 was a horrible, terrible crime. It was. This trial is about [defendant's] mental capacity on August 16th, 2012.
>
> . . . .
>
> I can't stand here before you and put into words or to justice how difficult I'm sure it was for [the victim's family] to sit here and live through this and go through this, and I can tell you that I'm sorry. That's an understatement, ladies and gentlemen.
>
> At the same time, I'm representing [defendant], and we believe that on that day, August 16th, 2012, [defendant] had mental disorders on the day that he killed [the victim] and on the day of the assaults, and I had a duty to present those mental disorders to you in this case, and I hope you can understand that.
>
> Why is the mental health of a person who's committed a crime important? It's important because our legislature and our courts say it is. It is the law of our state. Our law says it matters.
>
> . . . .
>
> I'm not [going to] talk about the videos again because the videos are very clear. You've seen them with your own eyes. I don't need to tell you what they look like; you saw how horrible they were.

. . . .

> And certainly I do not—I'll say it again. I don't ignore the fact that these crimes that you saw on the videotape were horrible for every person [who] was there, including that little boy who was right in the middle of it, but that's not for deliberation.
>
> We're not deciding how horrible it is. We're trying to decide mental capacity, whether or not [defendant] had the mental capacity to commit the crime—the three crimes that he's charged with, and I would contend that he did not.

We preliminarily note that although we appreciate the caution exercised by defendant's trial counsel and the trial court in conducting a *Harbison*-like inquiry, *Harbison* is inapposite to this issue as this issue does not relate to any concession of guilt made by defendant's trial counsel. *See Harbison*, 315 N.C. at 180, 337 S.E.2d at 507-08. Rather, defendant is challenging his counsel's trial strategy in describing defendant's crimes as "horrible." Accordingly, we employ the two-part *Strickland v. Washington* analysis to this component of defendant's IAC claim:

> To prevail in a claim for IAC, a defendant must show that his (1) counsel's performance was deficient, meaning it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense, meaning counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. As to the first prong of the IAC test, a strong presumption exists that a counsel's conduct falls within the range of reasonable professional assistance. Further, if there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient.

State v. Smith, 230 N.C. App. 387, 390, 749 S.E.2d 507, 509 (2013) (citations, quotation marks, and brackets omitted) (applying IAC analysis from *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984)), *cert. denied*, 367 N.C. 532, 762 S.E.2d 221 (2014).

Here, in closing argument, defendant's trial counsel pointed out to the jury that while defendant's crimes were "horrible[,]" the gravity of his crimes was not the issue they had to determine. Rather, defendant's trial

counsel was impressing on the jury that they should base their decision on whether they believed defendant lacked the mental capacity necessary for premeditation and deliberation. We therefore hold that defendant has failed to rebut the "strong presumption . . . that a counsel's conduct falls within the range of reasonable professional assistance." *See id.*, 749 S.E.2d at 509 (citation omitted).

In addition, "there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different," since the State proffered overwhelming evidence of defendant's guilt of the first-degree murder offense. *See id.*, 749 S.E.2d at 509. In addition to the video recordings showing defendant repeatedly stabbing the victim, the State proffered the testimony of the victim's mother and sister. *See State v. Taylor*, 337 N.C. 597, 608, 447 S.E.2d 360, 367 (1994) ("From the vicious assault and from the multiple wounds, many of which must have been inflicted after the victim had been felled and rendered helpless, the jury could reasonably infer that the defendant acted with premeditation and deliberation."). We also note that the jury found defendant guilty of first-degree murder under both a theory of premeditation and deliberation and a theory of felony murder based on either of defendant's felony assault offenses on the victim's mother and sister. Since defendant's trial counsel's performance was not deficient and "there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different," we hold that defendant has failed to demonstrate that he was deprived of effective assistance of counsel. *See Smith*, 230 N.C. App. at 390, 749 S.E.2d at 509 (citation omitted).

III. Admission of Evidence

Defendant next argues that the trial court erred in admitting hearsay testimony of the victim's sister, Daisha Turner, over his counsel's objection.

A. Preservation of Error

[3] The State argues that defendant waived this issue, as his counsel did not state the ground for his objection. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make *if the specific grounds were not apparent from the context*." N.C.R. App. P. 10(a)(1) (emphasis added). We examine defendant's objection in context:

> [Prosecutor]: So [you and the victim] were relaxing and sitting around[?]
>
> [Daisha Turner]: Yes, and at one point [the victim] confided in me. At one point she confided in me, and *she was telling me* about the relationship more than what I knew, and that she was scared of [defendant].
>
> [Defendant's counsel]: Objection.
>
> [Prosecutor]: *Present sense impression.*
>
> THE COURT: Objection overruled.
>
> [Prosecutor]: Okay. She had told you that she was scared of him[?]
>
> [Daisha Turner]: Yes.

(Emphasis added.)

Viewed in context, it is "apparent" that defendant's objection was based on hearsay. *See id.* The prosecutor immediately understood this ground for defendant's objection, as evidenced by his argument that Ms. Turner's testimony fit within the present-sense-impression hearsay exception. *See* N.C. Gen. Stat. § 8C-1, Rule 803(1) (2013) (providing that a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" is an exception to the general rule that hearsay evidence is inadmissible). In addition, defendant had made several hearsay objections immediately before this particular objection, and the trial court had cautioned Ms. Turner three times not to say what the victim said. Accordingly, we hold that the ground for defendant's objection was "apparent from the context." *See* N.C.R. App. P. 10(a)(1).

Relying on *State v. Atkinson* and *State v. Teeter*, the State next argues that defendant waived this issue because his counsel did not move to strike Ms. Turner's testimony. *See State v. Atkinson*, 309 N.C. 186, 189, 305 S.E.2d 700, 703 (1983) ("The failure to move to strike the answer waives any objection to the information elicited when the inadmissibility of the testimony appears only in the response of the witness."); *State v. Teeter*, 85 N.C. App. 624, 630, 355 S.E.2d 804, 808, *appeal dismissed and disc. review denied*, 320 N.C. 175, 358 S.E.2d 67 (1987). We distinguish *Atkinson* and *Teeter*.

In *Atkinson*, on cross-examination, the prosecutor sought "to elicit from [the] defendant the admission that he was avoiding a criminal

charge in New Jersey." *Atkinson*, 309 N.C. at 188, 305 S.E.2d at 702. The prosecutor "did not seek to put before the jury the specific nature of the charge; rather, he was attempting to question [the] defendant about an act of misconduct, *i.e.*, avoiding criminal prosecution." *Id.*, 305 S.E.2d at 702. The defendant's counsel objected to the prosecutor's question, and the trial court overruled the objection. *Id.* at 187, 305 S.E.2d at 701-02. The defendant then volunteered the details of the criminal charge, and his counsel did not object or move to strike his answer. *Id.* at 187-88, 305 S.E.2d at 702. Our Supreme Court held that the prosecutor's question was proper but that "[t]he issue of whether the information actually given by defendant in response to the prosecutor's question was admissible, as distinguished from the propriety of the question itself, [was] not properly before [the Court]." *Id.* at 188-89, 305 S.E.2d at 702-03. In *Teeter*, the defendant on appeal argued that an expert witness "was improperly permitted to state an opinion concerning the credibility of the prosecuting witness and the guilt or innocence of [the] defendant[,]" but this Court held that the defendant had waived this issue, because the "defendant neither objected to the question nor moved to strike the answer." *Teeter*, 85 N.C. App. at 628-30, 355 S.E.2d at 807-08.

In contrast, here, defendant objected to Ms. Turner's answer. Unlike the defendants in *Atkinson* and *Teeter* who failed to object to the allegedly inadmissible answers of the witnesses, defendant "presented to the trial court a timely request, objection, *or* motion" to the testimony that he specifically challenges on appeal. *See* N.C.R. App. P. 10(a)(1) (emphasis added); *Atkinson*, 309 N.C. at 187-88, 305 S.E.2d at 701-02; *Teeter*, 85 N.C. App. at 630, 355 S.E.2d at 808.

Relying on *State v. Whitley*, the State finally argues that defendant waived this issue because after defendant's objection, Ms. Turner *immediately* repeated the challenged testimony. *See State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984) ("Where evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost."). We distinguish *Whitley*.

There, the defendant objected to a detective's use of the term "crime scene" in his testimony. *Id.* at 660, 319 S.E.2d at 587. Our Supreme Court held that the defendant had waived this issue, because the defendant did not object to the detective's use of the term on four other occasions in his testimony. *Id.* at 660-61, 319 S.E.2d at 587-88. In contrast, here, the prosecutor asked Ms. Turner the following clarifying question *immediately* after the trial court overruled defendant's objection:

"[The victim] had told you that she was scared of him[?]" Ms. Turner responded: "Yes." Accordingly, we hold that defendant has preserved this issue for appellate review. *See State v. Dalton*, ___ N.C. App. ___, ___, 776 S.E.2d 545, 550 (rejecting a similar waiver argument in the context of a closing argument), *temporary stay allowed*, ___ N.C. ___, 777 S.E.2d 72 (2015).

B. Standard of Review

"This Court reviews a trial court's ruling on the admission of evidence over a party's hearsay objection *de novo*." *State v. Hicks*, ___ N.C. App. ___, ___, 777 S.E.2d 341, 348 (2015), *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (No. 396P15 Jan. 28, 2016).

C. Analysis

[4] On appeal, the State argues that Ms. Turner's statement was admissible under both the present-sense-impression hearsay exception and the state-of-mind hearsay exception. *See* N.C. Gen. Stat. § 8C-1, Rule 803(1), (3). Because the state-of-mind hearsay exception better fits the facts of this case, we will address only whether Ms. Turner's statement was admissible under that exception. We note that although the trial court did not admit her statement under the state-of-mind hearsay exception, we generally uphold a trial court's ruling "if it is correct upon any theory of law[.]" *Cf. Opsahl v. Pinehurst Inc.*, 81 N.C. App. 56, 63, 344 S.E.2d 68, 73 (1986) (citation omitted) (discussing this general rule in the context of contract law), *disc. review improvidently allowed per curiam*, 319 N.C. 222, 353 S.E.2d 400 (1987); *State v. Coffey*, 326 N.C. 268, 285-86, 389 S.E.2d 48, 58 (1990) (upholding the trial court's evidentiary ruling despite finding that the trial court had admitted the challenged statement under the wrong hearsay exception); *State v. McElrath*, 322 N.C. 1, 15, 19, 366 S.E.2d 442, 450, 452 (1988) (same).

> Hearsay is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. As a general rule, hearsay is inadmissible at trial. [North Carolina Rules of Evidence] 803 and 804, however, provide exceptions and permit the admission of hearsay statements under certain circumstances.

State v. Morgan, 359 N.C. 131, 154, 604 S.E.2d 886, 900 (2004) (citations and quotation marks omitted), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 79 (2005); *see also* N.C. Gen. Stat. § 8C-1, Rules 801, 802, 803, 804 (2013). North Carolina Rule of Evidence 803(3) provides that a "statement of

the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will" is admissible as a hearsay exception. N.C. Gen. Stat. § 8C-1, Rule 803(3).

> "It is well established in North Carolina that a murder victim's statements falling within the state of mind exception to the hearsay rule are highly relevant to show the status of the victim's relationship to the defendant." *State v. Alston*, 341 N.C. 198, 230, 461 S.E.2d 687, 704 (1995), *cert. denied*, [516 U.S. 1148], 134 L. Ed. 2d 100 (1996); *see State v. McHone*, 334 N.C. 627, 637, 435 S.E.2d 296, 301-02 (1993) (state of mind relevant to show a stormy relationship between the victim and the defendant prior to the murder), *cert. denied*, [511 U.S. 1046], 128 L. Ed. 2d 220 (1994); *State v. Lynch*, 327 N.C. 210, 222, 393 S.E.2d 811, 818-19 (1990) (the defendant's threats to the victim shortly before the murder admissible to show the victim's then-existing state of mind); *State v. Cummings*, 326 N.C. 298, 313, 389 S.E.2d 66, 74 (1990) (the victim's statements regarding the defendant's threats relevant to the issue of her relationship with the defendant).

State v. Crawford, 344 N.C. 65, 76, 472 S.E.2d 920, 927 (1996).

The victim's statement that she "was scared of" defendant unequivocally demonstrates her state of mind and is "highly relevant to show the status" of her relationship with defendant on the night before she was killed. *See id.*, 472 S.E.2d at 927. Accordingly, we hold that this statement was admissible under the state-of-mind hearsay exception. *See* N.C. Gen. Stat. § 8C-1, Rule 803(3).

But even assuming *arguendo* that this statement was inadmissible, we hold that defendant has failed to demonstrate that "there is a reasonable possibility that, had the [alleged] error in question not been committed, a different result would have been reached at the trial[.]" *See* N.C. Gen. Stat. § 15A-1443(a) (2013). As discussed above, the State proffered overwhelming evidence supporting defendant's conviction of first-degree murder under theories of both premeditation and deliberation and felony murder. Accordingly, we hold that defendant has failed to demonstrate that this alleged error prejudiced him.

IV. Conclusion

For the foregoing reasons, we hold defendant was not deprived of effective assistance of counsel and that the trial court committed no error.

NO ERROR.

Judges CALABRIA and INMAN concur.

STATE OF NORTH CAROLINA
v.
JUSTIN DUANE HURD, DEFENDANT

No. COA15-588

Filed 15 March 2016

1. Jury—selection—State's *Batson* challenge

The trial court did not err in a first-degree murder prosecution by sustaining the State's objection under *Batson v. Kentucky*, 476 U.S. 79, to the defendant's exercise of peremptory challenges based on gender and race. Defendant's acceptance rate of black jurors was 83%, which was notably higher than his 23% acceptance rate for white and Hispanic jurors. The trial court properly considered the totality of the circumstances, including the judge's past experience as a capital defender, the credibility of defense counsel, and the context of the peremptory strike against juror 10, a white male.

2. Criminal Law—prosecutor's closing argument—witness killed

The State's closing argument in a first-degree murder prosecution was not grossly improper where the State's argument that defendant had a witness killed was based upon record evidence.

Appeal by Defendant from judgments entered 6 March 2014 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 December 2015.

Attorney General Roy Cooper, by Assistant Attorney General Amy Kunstling Irene and Sherri Horner Lawrence, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kathryn L. VandenBerg, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

Justin Duane Hurd ("Defendant") appeals following a jury verdict convicting him of three counts of first degree murder, two counts of first degree kidnapping, and one count of first degree arson. Following the verdict, the trial court imposed three consecutive life sentences without parole. On appeal, Defendant asks this Court to vacate his convictions and remand for a new trial, and contends (1) the trial court clearly erred in sustaining the State's *Batson* challenge, (2) the State's closing argument was grossly improper and the trial court should have intervened *ex mero motu*, and (3) the State's closing argument violated Due Process. We disagree.

I. Factual and Procedural Background

On 20 April 2009, a Mecklenburg County grand jury indicted Defendant for three counts of first degree murder, two counts of first degree kidnapping, and one count of first degree arson. On 18 June 2009, the case was declared capital and Defendant pled not guilty. The case was called for trial 21 January 2014. The State presented a circumstantial case using thirty-three witnesses and over 268 exhibits. None of the State's witnesses were eyewitnesses to the murders. Two of the witnesses testified they met Defendant in jail and heard him claim responsibility for the murders. On appeal, Defendant does not contest the veracity of the State's evidence. The following is a summary of the evidence taken in the light most favorable to the State.

In January 2008, Antonio Harmon ("Harmon"), Nathaniel Sanders ("Sanders"), and two other men traveled from Cincinnati, Ohio to meet with Defendant in Atlanta, Georgia. During the meeting, Sanders talked to Defendant for twenty minutes. Harmon had seen Defendant once or twice in Cincinnati, but never talked to him. While Defendant and Sanders spoke, Harmon looked inside Defendant's car and saw a duffel bag of guns inside.

On 1 February 2008, Defendant called Sanders to meet again. Defendant, Sanders, Harmon, and the two other men met at a bar. During this meeting Defendant and Sanders spoke, and Harmon saw a duffel bag containing a Taser inside Sanders's van.

After the meeting, Sanders put the duffel bag of guns inside his van, and told Harmon they could "go out of town and bust a couple of moves"

"to get some extra cash." Harmon declined because he "didn't want to get caught up in anything," and decided to go home to Cincinnati.

On 3 February 2008, Kevin Young lived in a house located in Charlotte, North Carolina, with his girlfriend Kinshasa Wagstaff and her nineteen-year-old niece, Jasmine Hines. Young trafficked marijuana and worked as a disc jockey and handyman, and Wagstaff worked in real estate. Young owed "big money" to "some drug dealers" in New York.

During the evening of 3 February 2008, Defendant acted as an "enforcer" for the New York drug dealers and went to Young's house with Sanders. Defendant killed Young, Wagstaff, and Hines inside the home, and made Sanders "pull the trigger . . . so [he too] would be accountable." They burned the house down and put evidence inside a Cadillac Escalade parked inside the garage. The garage door was "kind of pushed out and crumpled up" such that Defendant and Sanders could not drive the Escalade away. The Escalade contained gasoline cans, lighters, trash bags, tennis shoes with Wagstaff's blood on them, and a trash bag containing gasoline, raw chicken parts, a bent knife with a broken tip and Young's blood on it, a Taser, beer bottle, and water bottles.

Investigators found Wagstaff's charred body lying in the front foyer of the house, with her dog's burned body lying next to her. They found various items nearby including a bloody scarf, bloody bed sheet, cell phone, purse, keys, and mail. A medical examination revealed she had multiple stab wounds to the neck, amid "a number of trauma injuries." Her left wrist was bound with double stranded copper wire, and both of her wrists sustained "fire fractures" from being exposed to heat.

In the kitchen, police found Young's charred body next to a spent .45 caliber shell casing. His hands were handcuffed behind his back. He sustained a lethal gunshot wound to the abdomen and "two sharp force injuries" to the neck and cheek.

Hines's body was found uncharred. She had a gag in her mouth formed out of "an orange dish towel that had a scarf [and duct tape] wrapped around it." Hines had two gunshot wounds to her head and back, "some blunt force injuries," bruises, scrapes, and chemical burns to her back, legs, and arms.

At 4:59 a.m., Sanders drove to a nearby Run Exxon gas station between Huntersville and Charlotte. He went into the store and bought coffee and gas cans. The store clerk, Rodchester Hutchins, noticed Sanders had "a busted lip" and a red substance on his hoodie that looked like blood. Sanders appeared "nervous" and said he was "tired." Hutchins

told Sanders to pull his van behind the gas station to rest, but Sanders declined because "he had to get back to Atlanta." He was murdered in Cincinnati six months later.

Defendant was arrested in May 2009 and indicted for the 3 February 2008 triple murder. When he was incarcerated awaiting trial, he told two inmates that Sanders "was taken care of," and he did not have to worry about any witnesses. Defendant was never charged with Sanders's murder.

On 18 June 2009, the case was declared capital. Sometime[1] prior to trial, defense counsel filed a pretrial motion entitled, "Motion to Prohibit District Attorney From Peremptorily Challenging Prospective Black Jurors." In it, Defendant requested the trial court "prohibit the District Attorney from exercising peremptory challenges as to potential Black jurors, or in the alternative to order that the District Attorney state reasons on the record for peremptory challenges of such jurors." The trial court noted the motion was "not supported by any showing of a discriminatory practice or intent on behalf of the State," and denied the motion.

The case was called for trial 21 January 2014. On the eighth day of jury selection, 3 February 2014, prospective Juror 10 was called to the jury box. Juror 10 is a fifty-year-old white male who works for the U.S. Postal Service. During *voir dire*, Juror 10 said he could follow the law and be fair and impartial. He described his "feelings about the death penalty" as follows:

> Personally, I don't—I don't like the fact that someone's life [is] being taken, but at the same time if that justice is—word that correctly. I think that's what we need to be done, I would think I could go through—I mean, I think I can make a decision on that. . . . I would guess I would say before I came here I have no problem. Now that I'm here, I'm actually thinking about it makes you stop and think. I would like to think based on the facts I could make a decision.

He said he did not have strong feelings "for" or "against" the death penalty, and he could give "fair and equal consideration to both the death penalty" and "life in prison without the possibility of parole." He was asked to rate himself on a scale of one to seven, one being "the type

1. We note this filing is cited in the trial court's written order filed 18 February 2014. The trial court's order does not mention a specific filing date for the motion, and a copy of the motion does not appear in the record on appeal.

of person who always gives [a life sentence] regardless of the circumstances if someone is convicted of first-degree murder," and seven being "the kind of person who always will give the death penalty." Juror 10 rated himself "[p]robably about a four." He elaborated as follows: "Well, having not heard facts . . . I think . . . there's a punishment for a crime. If the facts show that that's what it would call for, I believe I could do that. However, I'm not on one spectrum either." The other jurors rated themselves a "four, five," a "three and a half," a "three and a half to a four," and "right down the middle."

Juror 8 is a thirty-eight year-old woman who identifies as "Asian/Black." She served in the Army and is employed as an EMS dispatcher. Her husband is self-employed and works as a process server and bail bondsman. Her sixteen-year-old stepson is in jail facing charges for second degree attempted assault and sexual battery. Juror 8 stated she and her husband could have bailed her stepson out of jail but chose not to. She explained, "as much as I want to protect my children, I have to protect the community . . . . [u]ntil I know that it's a safe environment for both him and the community, he'll stay in there." "[If] he did it and the DA can prove that he did it, then yes, he does need to be punished for what he did and he needs to get the help that he needs." She stated she did not hold it against the State that they were prosecuting her stepson, that she was able to "separate" that matter from the murder trial, and she could be fair and impartial to both parties. When asked about the death penalty scale of one to seven, she rated herself a four. She also helped her biological son write a paper for his high school project in December 2013, entitled "Abolishment of the Death Penalty." The paper discussed statistics, states' adoption of the death penalty, and when the last execution occurred in death penalty states.

Outside the presence of the jury pool, defense counsel attempted to strike prospective Jurors 1, 5, 6, and 10. The State raised a *Batson* challenge based on gender and race. The State argued as follows:

> By the State's count of the jurors that have been passed during both rounds to the defense, the defense has had the opportunity to peremptory strikes [sic] on 13 total white jurors. Of those 13, they have stricken 10 of them. The math comes out to 76.9 percent of all white jurors that the defense has had an opportunity to use peremptory challenges on have been struck. . . . As far as the females go, by the State's count, the defense has had the opportunity

> to use peremptories on nine female jurors. It has stricken six of those.

The trial court referred to its notes and calculated the defense accepted two of seven while males, zero of six white females, three of three black males, and two of three black females.

Defense counsel and the trial court discussed the issue as follows:

> [DEFENSE COUNSEL]: I can give you a race-neutral reason for the last four. . . . [Juror 10 was] struck because he stated that the punishment should fit the crime, and we felt that he was in favor of capital punishment as a matter of disposition as opposed to analytical comprehension of the law.
>
> [THE COURT]: But I think he also described himself as being on your scale of one to seven about a four.
>
> [DEFENSE COUNSEL]: Yeah, but I don't think we have to accept what [Juror 10] says using his other answers in context.
>
> [THE COURT]: Well, I think you have to take the totality of what he's saying.

The trial court recessed briefly and returned giving "a summary explanation of the Court's conclusions." The trial court summarized as follows:

> [T]he State has shown a prima facie [case] for what I would call its reverse Batson claim. The defendant has offered explanations for the strikes as to the four jurors in question. The Court concludes that those explanations as to [Jurors 1, 5, and 6] are not pretextual. The Court does conclude with respect to [Juror 10], that the explanation is pretextual. . . . the Court perceives from listening to the voir dire that, particularly Juror [8], was much worse. The Court having previously practiced law and the Court did considerable amount of criminal defense work, particularly capital defense, and tried a number of cases trying to elicit opinions of jurors as to what they thought about the death penalty. From that experience, the Court perceived that Juror [8] was much worse on the death penalty than Juror [10], and so doesn't find the explanation that was because of the death penalty was particularly credible.

Thereafter, the prospective jurors were brought back into the courtroom. Jurors 1, 5, and 6 were excused through defense counsel's peremptory challenge, and Juror 10 was kept on the jury panel.

The trial court issued a written order on 18 February 2014 that stated the following, *inter alia*:

> 15. Of the peremptory challenges used by the defense, 10 out of 11 were exercised against white and Hispanic jurors. Over 90% of the defense's peremptory challenges were exercised against white and Hispanic jurors.
>
> 16. The sole African American juror challenged peremptorily by the defense was currently employed by the State of North Carolina as a probation officer.
>
> 17. When the defense indicated its intention to peremptorily challenge 4 of the 5 prospective white jurors in this group of eight jurors, the State objected on the ground that the defense was excusing jurors on impermissible racial and sexual grounds.
>
> 18. A claim that a peremptory challenge is improperly based upon race triggers a three-step inquiry. State v. Waring, 364 N.C. 443, 474, 701 S.E.2d 615 (2010).
>
> 19. Batson has been expanded to prohibit not only the State, but also criminal defendants, from engaging in purposeful racial discrimination in their exercise of peremptory challenges. State v. Cofield, 129 N.C. App. 268, 498 S.E.2d 823 (1998). . . .
>
> 27. The defendant in this case is an African American male.
>
> 28. The alleged victims in these cases are all African Americans. Two of the three alleged victims were female. . . .
>
> 35. The defense filed a pre-trial motion entitled "Motion to Prohibit District Attorney From Peremptorily Challenging Prospective Black Jurors." This motion requested the Court "to prohibit the District Attorney from exercising peremptory challenges as to potential Black jurors, or in the alternative, to order that the District Attorney state reasons on the record for peremptory challenges of such jurors.["] This request was not supported by any showing

of a discriminatory practice or intent on behalf of the State. . . .

51. If a prima facie showing of discrimination is established, the burden shifts to the opposing party to articulate a race neutral explanation for its exercise of peremptory challenges. State v. Maness, 363 N.C. 261, 272, 677 S.E.2d 796 (2009). . . .

54. The defense offered its race-neutral explanations for its exercise of these peremptory challenges. . . .

69. At the time that the defense announced its intention to peremptorily challenge [Juror 10], the defense accepted [Juror 8] as a juror. [Juror 8] is an African American female. . . .

84. As a former trial lawyer, who represented defendants in capital cases, the Court interpreted [Juror 10's] language and demeanor as an indication that he would be reluctant to actually return a death sentence. The [C]ourt observed no reluctance on the part of [Juror 8] to make difficult decisions, including the decision to leave her stepson in jail even though her husband was a bail bondsman who could have posted the bond. . . .

89. A comparison of [Juror 8's] and [Juror 10's] responses concerning the death penalty reveal that at a minimum their views were strikingly similar.

90. In this case, the defendant's race, the victims' race, the repeated use of peremptory challenges against white jurors such that it tended to establish a pattern of strikes against whites in the venire, the use of a disproportionate number of peremptory challenges to strike white jurors and the defense's acceptance rate of white jurors indicate that the defense has exercised challenges against white jurors in a discriminatory manner.

91. The Court concludes based on a totality of the circumstances that [Juror 10's] race was a significant and motivating factor in the decision to exercise a peremptory challenge against him. . . .

> 96. In this instance, [Juror 10] was not advised that the defense attempted to exercise a peremptory challenge against him. . . .
>
> [T]he Court sustains the State's objection to the defense's attempt to exercise a peremptory challenge against [Juror 10] on the ground that [Juror 10's] race was a significant and motivating factor in the attempt to exercise a peremptory challenge to excuse him from further jury service in violation of the rule created in Batson.

Trial proceeded and the State called numerous witnesses. The State rested on 26 February 2014 and asked the trial court to take judicial notice that Sanders died. The court granted the request and stated the following for the jury:

> [THE COURT]: [T]he Court at this point is going to take judicial notice of three items. First, that Nathaniel Sanders, also known as Nate Sanders and Lil Nate died on September 28th, 200[8]. Second, that he died in Cincinnati, Ohio. . . . and that someone other than the Defendant has been indicted for the murder of Nathaniel Sanders in Ohio.

Afterwards, Defendant did not present any evidence. The parties gave their closing arguments and the State argued the following:

> [THE STATE]: The last thing . . . I want to talk to you about that the Defendant told [the two inmates that testified that the] witness that actually could put him in Charlotte, he's dead and he had him killed. . . . [And] judicial notice [] was taken by [] the Court gave you before [sic] we started closing argument was that Nathaniel Sanders was killed, I believe the judge said September 28th, 2008. . . . And that someone other than the Defendant was charged with that murder. Well, the Defendant never said he killed the eyewitness, he said he had him killed. Here's another interesting thing about the death of Nathaniel Sanders. . . . Detective Rainwater went and interviewed [Defendant's] girlfriend on September 23rd and asked her where [Defendant] was, showed her a photograph [of Nathaniel Sanders] . . .
>
> [DEFENSE COUNSEL]: Objection, your Honor. There's no evidence in the record.
>
> [THE COURT]: Overruled.

In addition to its oral argument, the State used slides that posed the following questions:

- Defense on cross with [police detective] intimated [Defendant] and [Kevin Young] could be friends
- If they were friends then where are the witnesses or other evidence to substantiate that?
- Defense on cross with [police detective] intimated [Defendant] could have been in [Kevin Young's] home on an earlier occasion.
- If he had been in the house, then where are the witnesses or other evidence to substantiate that?
- Defense wants you to believe that [Defendant] drove the [Toyota] Camry[2] on an earlier occasion.
- If he drove the [Toyota] Camry on an earlier occasion, then where are the witnesses or other evidence to substantiate that?
- If there was some good reason to analyze the inside of the black garbage bag.
- Why didn't they have it analyzed?
- Where is their DNA analyst?

After closing arguments, the jury began deliberation. The jury returned unanimous guilty verdicts on all charges. The jury recommended a sentence of life without parole for each murder. The trial court imposed three consecutive life sentences without the possibility of parole. Defendant timely entered his notice of appeal.

II. Standard of Review

First, Defendant contends the trial court erred in sustaining the State's *Batson* challenge. "The 'clear error' standard is a federal standard of review adopted by our courts for appellate review of the *Batson* inquiry." *State v. James*, 230 N.C. App. 346, 348, 750 S.E.2d 851, 854

2. We note the State's evidence tended to show Kevin Young and Kinshasa Wagstaff kept a white Toyota Camry outside their house. The State's theory seemed to indicate that, based on DNA evidence, Defendant drove the car away after murdering Young, Wagstaff, and Hines, and setting the house on fire.

(2013) (citing *State v. Cofield*, 129 N.C. App. 268, 275 n.1, 498 S.E.2d 823, 829 n. 1 (1998)). "Since the trial judge's findings . . . largely will turn on evaluation of credibility a reviewing court ordinarily should give those findings great deference." *James*, 230 N.C. App. at 348, 750 S.E.2d at 854 (citations omitted). "The trial court's ultimate *Batson* decision will be upheld unless the appellate court is convinced that the trial court's determination is clearly erroneous." *Id.* (citation omitted).

Second, Defendant argues he timely objected to the State's closing argument, and the trial court abused its discretion in overruling his objection. This Court is "mindful of the reluctance of counsel to interrupt his adversary and object during the course of closing argument for fear of incurring jury disfavor." *See State v. Jones*, 355 N.C. 117, 129, 558 S.E.2d 97, 105 (2002). However, the State twice argued Defendant had Sanders killed before Defendant objected, seemingly in opposition to the State's argument concerning Defendant's girlfriend. Therefore, Defendant failed to timely object under N.C. R. App. Pro. 10(a)(1) and we review whether the State's closing remarks "were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *Id.* at 133, 558 S.E.2d at 107 (citation omitted).

Third, Defendant contends the State's closing argument slides violated Due Process by placing a burden of proof upon him. However, Defendant concedes "North Carolina law may permit jury argument that a defendant has failed to present certain evidence" and merely preserves this issue for "further federal review." Therefore, we assign no error to this argument.

III. Analysis

[1] In a capital murder case the defendant and State each is afforded fourteen peremptory challenges each during jury selection. N.C. Gen. Stat. § 15A-1217(a). However, Article I, Section 26 of the Constitution of North Carolina and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution "prohibit race-based peremptory challenges during jury selection." *James*, 230 N.C. App. at 348, 750 S.E.2d at 854 (citation omitted).

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court set out a three-part test for *Batson* objections. Our Supreme Court utilized this analysis in *State v. Taylor*, 362 N.C. 514, 669 S.E.2d 239 (2008), and set out the following test:

> First, the defendant must make a prima facie showing that the state exercised a race-based peremptory challenge. If

> the defendant makes the requisite showing, the burden shifts to the state to offer a facially valid, race-neutral explanation for the peremptory challenge. Finally, the trial court must decide whether the defendant has proved purposeful discrimination.

Id. at 527, 669 S.E.2d at 254 (citations omitted). While the above test is written in the context of a defendant raising a *Batson* objection to the State's use of peremptory challenges, our Court has made clear that the State may also raise a *Batson* challenge to a defendant's use of peremptory challenges, sometimes referred to as a "reverse *Batson*" objection. *See Cofield*, 129 N.C. App. 268, 498 S.E.2d 823. In the case *sub judice*, Defendant only challenges the third prong of the *Batson* test and contends the trial court clearly erred in finding the State proved Defendant engaged in purposeful discrimination by peremptorily striking Juror 10.

To determine whether the State proved Defendant engaged in purposeful discrimination, "the trial court should consider the totality of the circumstances, including counsel's credibility, and the context of the information elicited." *Id.* at 279, 498 S.E.2d at 831 (citing *State v. Barnes*, 345 N.C. 184, 212, 481 S.E.2d 44, 59 (1997); *State v. Thomas*, 329 N.C. 423, 432, 407 S.E.2d 141, 148 (1991), *cert. denied*, 522 U.S. 824 (1997)). It is relevant, but not dispositive, to consider whether a party's use of peremptory challenges creates a "disproportionate impact on prospective jurors of a particular race." *Id.* (citing *State v. Hernandez*, 500 U.S. 352, 363 (1991)).

Our Supreme Court has utilized the following factors to determine if a party is engaging in purposeful discrimination:

> (1) the susceptibility of the particular case to racial discrimination; (2) whether similarly situated [blacks][3] were accepted as jurors; (3) whether the [party at issue] used all of its peremptory challenges; (4) the race of the witnesses in the case; (5) whether the early pattern of strikes indicated a discriminatory intent; and (6) the ultimate racial makeup of the jury. In addition, [a]n examination of the actual explanations given by the [party at issue] for

3. The race of the jurors in this quotation has been changed to the relevant facts of the case *sub judice*. The *Robinson* Court reviewed a *Batson* objection alleging the State engaged in purposeful discrimination by striking black jurors and keeping white jurors.

> challenging [white][4] veniremen is a crucial part of testing [the State's] *Batson* claim. It is satisfactory if these explanations have as their basis a "legitimate hunch" or "past experience" in the selection of juries.

James, 230 N.C. App. at 351, 750 S.E.2d at 856 (citing *State v. Robinson*, 336 N.C. 78, 93–94, 443 S.E.2d 306, 312–13 (1994), *cert. denied*, 513 U.S. 1089 (1995)).

Here, Defendant and the three murder victims are black. Defendant attempted to strike Juror 10, a white male. Defendant did not strike Juror 8, a black female. Juror 8 and Juror 10 rated themselves a "four" when asked to rate their predisposition favoring the death penalty on a scale of one to seven. However, this "state of circumstances in itself does not necessarily lead to a conclusion that the reasons given by defense counsel were pretextual." *Cofield*, 129 N.C. App. 268, 279, 498 S.E.2d 823, 831 (citations omitted).

We take note of Defendant's pretrial motion to prevent the State from exercising peremptory strikes against prospective black jurors. A copy of the motion does not appear in the record, but the trial court's findings clearly illustrate that Defendant sought to prevent the State from striking any black jurors, or in the alternative, inhibit the State from striking black jurors without stating a race-neutral reason for the strike. This motion was not made in response to any discriminatory action of record, and it was made in a case that is not inherently susceptible to racial discrimination. Further, the trial court's detailed findings explain Defendant exercised eleven total peremptory challenges, ten of which he used against white and Hispanic jurors. The only black juror Defendant challenged was a probation officer. Defendant's acceptance rate of black jurors was 83%, which is notably higher than his 23% acceptance rate for white and Hispanic jurors. Once the State raised its *Batson* challenge, defense counsel stated they struck Juror 10 because "he stated that the punishment should fit the crime . . . [and] he was in favor of capital punishment as a matter of disposition." Yet this fails to resolve Juror 10's statement that being in the jury box made him "stop and think" about the death penalty, that he did not have strong feelings for or against the death penalty, and he considered the need for facts to support a sentence.

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4. The race of the jurors in this quotation has been changed to the relevant facts of the case *sub judice*. The *Robinson* Court reviewed a *Batson* objection alleging the State engaged in purposeful discrimination by striking black jurors and keeping white jurors.

Defendant contends the trial court clearly erred by considering its past experience as a capital defender. We disagree. The trial court's experience bolsters its ability to discern matters like this. After reviewing the record, it is clear the trial court properly considered the totality of the circumstances, the credibility of defense counsel, and the context of the peremptory strike against Juror 10, including Defendant's pretrial motion. *Cofield*, 129 N.C. App. at 279, 498 S.E.2d at 831 (citations omitted). Therefore, in light of the record, we cannot hold the trial court committed clear error in sustaining the State's *Batson* objection.

[2] Next, Defendant contends the State's closing argument was grossly improper. To conduct this analysis we must determine whether the State's argument "strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made." *Jones*, 355 N.C. at 133, 558 S.E.2d at 107.

Trial counsel is afforded wide latitude in closing argument and "may argue all of the evidence which has been presented as well as reasonable inferences" arising from the evidence. *State v. Call*, 353 N.C. 400, 417, 545 S.E.2d 190, 202 (2001) (citations omitted). In a capital murder case, the prosecutor "has a duty to strenuously pursue the goal of persuading the jury that the facts of the particular case at hand warrant imposition of the death penalty." *Id.* (citation omitted).

The State introduced the testimony of witnesses who met Defendant in jail. They both testified Defendant told them he had a witness killed, the only witness that could put him in Charlotte at the time of the murder. Based on their testimony, the record evidence, and the timing of Sanders's death, it is fair to infer Defendant told the witnesses about Sanders, even if not by name. Moreover, the trial court took judicial notice and informed the jury that Sanders was killed 28 September 2008 in Cincinnati, and that someone other than Defendant was charged with his murder. With all of this in evidence, the State fairly inferred and argued Defendant had Sanders killed. Therefore, we hold the State's closing argument was not grossly improper. Assuming *arguendo*, that Defendant raised a timely objection to the State's closing, the trial court did not commit error, much less abuse its discretion, in overruling Defendant's objection since the State's argument was founded upon record evidence and inferences therefrom.

Lastly, Defendant preserves his third argument concerning the State's use of closing argument slides for "further federal review." Therefore, we assign no error to this contention.

IV. Conclusion

For the foregoing reasons we hold the trial court did not commit error.

NO ERROR.

Judges Stephens and Inman concur.

STATE OF NORTH CAROLINA
v.
TIMOTHY LADD, JR.

No. COA15-1071

Filed 15 March 2016

1. Search and Seizure—electronic devices—consent to search—not extended to external devices

In a prosecution for secretly using a photographic device with the intent to capture images of another person where defendant consented to a search of his cell phone and two laptops but not to external storage devices found with the laptops, the trial court erred by denying defendant's motion to suppress the information found on the external storage devices, based upon the stipulated evidence. Defendant's consent only extended to his two laptops and his smartphone. If the State wished to introduce evidence pertaining to the officers' understanding of defendant's consent, it should have presented or requested the court to hear additional testimony.

2. Search and Seizure—expectation of privacy—electronic devices—external devices

Defendant's privacy interests in the digital data stored on external devices were both reasonable and substantial. The search did not further any governmental interest in protecting officer safety or in preventing the destruction of evidence.

3. Search and Seizure—motion to suppress—reliance on stipulations

Unlike *State v. Salinas*, 366 N.C. 119, which held that a court cannot rely on a defendant's affidavit in lieu of presenting evidence when the State presents contradicting evidence at a suppression hearing, this case involved stipulations from the State and defendant and *Salinas* was not applicable.

Appeal by defendant from judgment entered 27 April 2015 by Judge J. Carlton Cole in Currituck County Superior Court. Heard in the Court of Appeals 22 February 2016.

Attorney General Roy Cooper, by Assistant Attorney General Phillip T. Reynolds, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse Jr., for defendant-appellant.

TYSON, Judge.

Timothy Allen Ladd, Jr. ("Defendant") appeals from judgment entered after he pled guilty to four counts of secretly using a photographic device with the intent to capture images of another person pursuant to N.C. Gen. Stat. § 14-202(f). We reverse the trial court's denial of Defendant's motion to suppress and vacate the plea and judgment entered thereon and appealed from.

I. Factual Background

On 20 November 2013, a female employee of the Currituck County Fire/EMS discovered an alarm clock located on the windowsill of the women's bunkroom facing two beds in the room. Two other female employees stated they noticed the clock was also present in the women's bunkroom on 18 November 2013. The clock contained an audio and video recorder, which activated when its sensor picked up a motion or noise. The clock also contained a Subscriber Identity Module (SIM) card.

Defendant was employed by Currituck County Fire/EMS as an EMT from June 2012 to December 2013. Defendant had slept in the women's bunkroom during his overnight shift. After the "alarm clock" was discovered, Chief Robert Glover of Currituck County Fire/EMS conducted a personnel interview with Defendant. Also present were Currituck County Sherriff's Sergeant Jeff Walker and Wesley Liverman, President of the Lower Currituck Volunteer Fire Department.

Defendant consented to a search of his personal laptop and his smartphone, but only to those two items, during the interview. He did not consent to a search of any other personal electronic or data storage devices. After the interview, Sergeant Walker escorted Defendant to Defendant's vehicle to retrieve the laptop, which was located inside a black nylon carrying case.

Sergeant Walker saw and seized a second laptop located on the vehicle's floorboard. Defendant consented to the search of the second laptop. Sergeant Walker and Defendant went to the Currituck County Sheriff's substation for Sergeant Walker to search both laptops and the smartphone.

Sergeant Walker did not find any incriminating evidence on either laptop or on the smartphone. He requested permission from Defendant to take the laptops to the Sheriff's Department main office for a further search of the contents of the computers. Defendant consented and left both laptops contained within the black nylon laptop bag with Sergeant Walker. Sergeant Walker gave the laptops to Sheriff's Detective Ruby Stallings.

Detective Stallings searched the contents of the black nylon laptop bag and discovered several external data storage devices. These included an external hard drive, numerous thumb drives, and micro secure digital cards. Detective Stallings searched the external hard drive and found video images of four or five women undressing or completely naked. The record on appeal is unclear whether any of these recovered images were taken in the EMS women's bunkroom.

Based upon her discovery of these images, Detective Stallings obtained a warrant to search the other external data storage devices located in Defendant's laptop bag. Defendant was charged with seven counts of secretly using a photographic device based upon images recovered after the search of the external data storage devices located within his laptop bag. On 3 February 2014, he was indicted by the Grand Jury on four of those counts.

On 10 March 2014, Defendant moved to suppress the evidence found by Detective Stallings when she viewed the external hard drive. The motion was denied and Defendant conditionally pled guilty, preserving his right to appeal the denial of the motion to suppress. The trial court entered judgment for four counts of secretly using a photographic device. Defendant appeals.

II. Issues

Defendant argues the trial court erred by denying his motion to suppress evidence obtained as a result of non-consensual and unreasonable searches without a valid warrant of both his laptop bag and of the external data storage devices found inside. While the State contends these searches were consensual and constitutional, it also argues this case should be remanded so further evidence can be presented in compliance with *State v. Salinas*, 366 N.C. 119, 729 S.E.2d. 63 (2012). We address both arguments below.

III. Fourth Amendment Analysis

Defendant argues the trial court erred by denying his motion to suppress evidence obtained as a result of non-consensual and unreasonable searches in violation of the Fourth, Fifth, and Fourteenth Amendments of the Constitution of the United States; Article 1, Sections 5, 19, 20, and 23 of the Constitution of North Carolina; and North Carolina General Statutes §§ 15A-221-223.

"An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty." N.C. Gen. Stat. § 15A-979(b) (2015). The fact that Defendant pled guilty to a crime arising from possession of evidence seized during a search does not preclude him from appealing the trial court's motion to suppress. *See State v. Jordan*, 40 N.C. App. 412, 413, 252 S.E.2d 857, 858 (1979).

Defendant properly reserved his right to appeal by notifying the State and the trial court of his intention to appeal the denial of the motion to suppress during the pre-trial hearing and during the plea negotiations. *See State v. McBride*, 120 N.C. App. 623, 625, 463 S.E.2d 403, 404 (1995), *disc. review allowed in part*, 343 N.C. 126, 468 S.E.2d 790, *aff'd*, 344 N.C. 623, 476 S.E.2d 106 (1996).

A. Standard of Review

The trial court's findings of fact regarding a motion to suppress are conclusive and binding on appeal if supported by competent evidence. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). This Court determines whether the trial court's findings of fact support its conclusions of law. *Id.*

We review the trial court's conclusions of law on a motion to suppress *de novo*. *State v. Edwards*, 185 N.C. App. 701, 702, 649 S.E.2d 646, 648, *disc. rev. denied*, 362 N.C. 89, 656 S.E.2d 281 (2007). " 'Under a

de novo review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

B. Consent

[1] Generally, if an individual consents to a search of himself or of his property, the Fourth Amendment is not implicated. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 36 L. Ed. 2d 854, 858 (1973) ("It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent."); *see State v. Belk*, 268 N.C. 320, 322-23, 150 S.E.2d. 481, 483-84 (1966).

However, a consensual search is limited by and to the scope of the consent given. *See State v. Jones*, 96 N.C. App. 389, 397, 386 S.E.2d. 217, 222 (1989). The scope of the defendant's consent is "constrained by the bounds of reasonableness: what the reasonable person would expect." *State v. Stone*, 362 N.C. 50, 54, 653 S.E.2d 414, 418 (2007); *see also Florida v. Jimeno*, 500 U.S. 248, 251, 114 L. Ed. 2d 297, 302 (1991) ("The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?").

During the hearing on the motion to suppress, the parties stipulated to the facts as set out by Defendant's counsel's affidavit, which accompanied Defendant's motion to suppress. In the trial court's order denying the motion, the court stated, "the Court so finds the facts as alleged in the Defendant's affidavit." The court did not consider any other evidence.

The relevant stipulated facts are:

> 8. Also during the interview, Mr. Ladd was asked for his consent to search his personal laptop and smartphone.
>
> 9. Timothy Ladd, Jr. consented *only* to the search of his personal laptop and smartphone.
>
> . . . .
>
> 14. Mr. Ladd consented to the search of the laptop found on the floorboard of his vehicle.
>
> . . . .

> 21. That Mr. Ladd consented to further review of the laptops by the Currituck County Sheriff's Department.
>
> . . . .
>
> 23. Upon receiving the laptops for review, Detective Ruby Stallings also searched the contents of the black nylon laptop bag and found numerous external data storage devices . . . .
>
> 24. *Without consent* from Mr. Ladd, Detective Ruby Stallings and Deputy Christopher Doxey "decided to view some of the micro SD cards USB ports that were confiscated from Timothy Ladd."
>
> 25. The *non-consensual search* of the external data storage devices produced electronic material purported to be evidence of illegal activity.
>
> 26. That on November 25, 2013, Detective Ruby Stallings used the material derived from the *non-consensual* search as the evidentiary basis for a warrant to search Mr. Ladd's external data storage devices.
>
> 27. That the purported evidence derived from the *non-consensual* search of the external data storage device led to Mr. Ladd being charged with seven (7) counts of felonious secret peeping into a room occupied by another person in the above-referenced file numbers.

(first emphasis in original).

Based on these findings of fact, the court concluded "that the defendant's consent for the search of his property was freely given." The stipulated facts relied on by the trial court clearly distinguish which searches Defendant consented to and which he did not. While Defendant consented to the search of his two laptops and his smartphone, the trial court's findings of fact unambiguously state that all searches beyond those three items were non-consensual.

Defendant contends the trial court's conclusion that he consented to the search was erroneous based on the stipulated facts, which clearly state the search of the external data storage devices was *non-consensual*. Because the trial court's findings of fact must support its conclusions of law, we agree with Defendant. *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619.

The State argues that, based on the standard of objective reasonableness, the officers understood Defendant's consent to the search to include both laptops, smartphone, and the external data storage devices. However, the State agreed and stipulated to the following finding of fact: "Timothy Ladd, Jr. consented *only* to the search of his personal laptop and smartphone." (emphasis original).

The stipulated facts contain no reference to the officers' understanding of Defendant's consent. If the State wished to introduce evidence pertaining to the officers' understanding of Defendant's consent, it should have presented or requested the court to hear additional testimony. We are bound by the findings of fact, as stipulated by the parties. We conclude Defendant's consent only extended to his two laptops and his smartphone.

C. Reasonable Expectation of Privacy

[2] Our finding that Defendant did not consent to the search does not complete our analysis. The trial court also concluded Defendant did not have a reasonable expectation of privacy in the external data storage devices.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

However, " '[i]t must always be remembered that what the Constitution forbids is not all searches and seizures, but *unreasonable* searches and seizures.' " *State v. Scott*, 343 N.C. 313, 328, 471 S.E.2d. 605, 614 (1996) (emphasis supplied) (quoting *Elkins v. United States*, 364 U.S. 206, 222, 4 L.Ed.2d 1669, 1680 (1960)). "A search occurs when the government invades reasonable expectations of privacy to obtain information." *State v. Perry*, __ N.C. App. __, __, 776 S.E.2d 528, 536 (2015), *disc. rev. denied and appeal dismissed*, __ N.C. __, __ S.E.2d __, 2016 WL 475539 (2016); *see Katz v. United States*, 389 U.S. 347, 351-52, 19 L.Ed.2d 576, 582 (1967) ("For the Fourth Amendment protects people, not places. . . . what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.").

To determine whether a defendant possessed a reasonable expectation of privacy, the court must consider whether: "(1) the individual manifested a subjective expectation of privacy in the object of the challenged search[;] and, (2) society is willing to recognize that expectation as reasonable." *Perry*, __ N.C. App. at __,776 S.E.2d at 536 (internal quotation marks omitted) (citing *Kyllo v. United States*, 533 U.S. 27, 33, 150 L. Ed. 2d 94, 101 (2001)).

The Supreme Court of the United States has acknowledged that serious privacy concerns arise in the context of searching digital data. *Riley v. California*, 573 U.S. ___, 189 L. Ed. 2d 430 (2014). In *Riley*, the Court emphasized the "immense storage capacity" of cell phones:

> Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy. Most people cannot lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read—nor would they have any reason to attempt to do so. . . .
>
> But the possible intrusion on privacy is not physically limited in the same way when it comes to cell phones. The current top-selling smart phone has a standard capacity of 16 gigabytes (and is available with up to 64 gigabytes). Sixteen gigabytes translates to millions of pages of text, thousands of pictures, or hundreds of videos. . . . We expect that the gulf between physical practicability and digital capacity will only continue to widen in the future.

Id. at __, 189 L. Ed. 2d at 446-47 (citations omitted). The Court held in *Riley* the officers must generally secure a warrant before searching a cell phone seized incident to arrest. *Id.* at __, 189 L. Ed. 2d at 451.

This Court has since relied on *Riley* to support an individual's expectation of privacy in the contents of a Global Positioning System ("GPS") device, which typically contains less personal information than a modern cell phone. *State v. Clyburn*, __ N.C. App. __, __, 770 S.E.2d. 689, 694 (2015). Quoting *Riley*, the Court stated:

> [C]ourts "generally determine whether to exempt a given type of search from the warrant requirement 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.' "

Id. at __, 770 S.E.2d at 693 (citation omitted). Applying this balancing test, the Court held the defendant's "expectation of privacy in the digital contents of a GPS outweighs the government's interests in officer safety and the destruction of evidence." *Id.* at __, 770 S.E.2d at 694.

While the officers had an interest in ensuring their safety when searching the laptop bag and inventorying the laptop bag's contents, the same cannot be said of examining the contents of the external data storage devices found inside of the bag. As the Supreme Court stated in *Riley*, "[d]igital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer." *Riley*, 573 U.S. at __, 189 L. Ed. 2d at 435. The external data storage devices found in Defendant's laptop bag posed no safety threat to the officers.

The officers also had no reason to believe the external data storage devices or the information they contained would be destroyed while they pursued a warrant based upon probable cause to search them. The officers had sole custody of these devices and Defendant was not present when these devices were found and searched.

In *Riley*, the Court held:

> The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone.

Id. at __, 189 L. Ed. 2d at 447.

The same analysis applies to the search of the digital data on the external data storage devices in this case. Depending on their storage capacities, external data storage devices can often contain as much, if

not more, personal information as a modern cell phone. External hard drives, in particular, can hold the entire contents of an individual's personal computer—all of their photographs, personal information and documents, work documents, tax forms, bank statements, and more. The information contained in these devices can span the course of many years and are capable of containing the "sum of an individual's private life." *Id.* We do not agree with the State's assertion that Defendant had no reasonable expectation of privacy in these devices and the information they contained to permit a search without a warrant.

As in *Clyburn* and *Riley*, the search of the external data storage drives did not further any governmental interest in protecting officer safety or in preventing the destruction of evidence. Defendant's privacy interests in the digital data stored on these storage devices are both reasonable and substantial. The trial court erred by concluding Defendant did not have a reasonable expectation of privacy in the contents of his external data storage devices and by upholding the non-consensual search of the external data storage devices.

IV. State v. Salinas

[3] Finally, the State argues that the North Carolina Supreme Court's decision in *State v. Salinas*, 366 N.C. 119, 729 S.E.2d 63 (2012) controls the outcome of this case. The Court held, "when ruling upon a motion to suppress in a hearing held pursuant to section 15A–977 of the North Carolina General Statutes, the trial court may not rely upon the allegations contained in the defendant's affidavit when making findings of fact." *Id.* at 126, 729 S.E.2d at 68. The State asserts the trial court's reliance upon the stipulated facts in Defendant's counsel's affidavit directly violates *Salinas*.

In *Salinas*, the defendant did not present any evidence during the hearing on his motion to suppress and relied solely on the facts as set out in his affidavit. *Id.* at 121, 729 S.E.2d at 65. The State presented testimony from several officers, which conflicted with the facts set out in the defendant's affidavit, regarding whether the officers had probable cause to make the stop. *Id.* at 121-22, 729 S.E.2d at 65.

Rather than requiring the defendant to present additional testimony, the trial court relied on defendant's affidavit, did not adjudicate the conflicting facts, and granted the defendant's motion to suppress. *Id.* at 122, 729 S.E.2d at 65-66. The Supreme Court stated the trial court "failed to make findings of fact sufficient to allow a reviewing court to apply the correct legal standard." *Id.* at 119-20, 729 S.E.2d at 64.

Here, the facts are easily distinguishable from those before the Court in *Salinas*. *Salinas* holds that a court cannot rely on a defendant's affidavit in lieu of presenting evidence when the State presents contradicting evidence at a suppression hearing. *Id.* at 124-25, 729 S.E.2d at 67. Unlike in *Salinas*, the parties before us agreed to stipulated facts as the basis for the trial court's findings of fact on the motion to suppress. Based upon this agreement, the court was not presented and did not have to consider any conflicting evidence.

In addition, we find that the facts as stipulated by both parties are sufficient for our *de novo* review of the trial court's conclusions. Neither N.C. Gen. Stat. § 15A–977 nor *Salinas* prevent parties from stipulating to the facts from which the trial court must determine whether the warrantless search was consensual, reasonable, and in the end, constitutional. With the lack of any conflicting evidence for the trial court to adjudicate, the holding in *Salinas* is not applicable here to require remand.

V. Conclusion

The trial court's conclusion of law that Defendant consented to the search of all of his property is not supported by its findings of fact, which clearly state that the search of the contents of Defendant's external data storage devices was non-consensual.

Defendant possessed and retained a reasonable expectation of privacy in the contents of the external data storage devices contained and found inside his laptop bag. The Defendant's privacy interests in the external data storage devices outweigh any safety or inventory interest the officers had in searching the contents of the devices without a warrant.

Without a lawful search, no probable cause supports the later issued search warrant. We reverse the trial court's conclusions of law and denial of Defendant's motion to suppress the evidence found as a result of a non-consensual and unreasonable search of the external data storage devices found in Defendant's laptop bag. Defendant's conditional guilty plea and judgment entered thereon are vacated.

REVERSED AND VACATED.

Judges CALABRIA and STROUD concur.

STATE OF NORTH CAROLINA
v.
REID WILBURN McLAUGHLIN

No. COA15-333

Filed 15 March 2016

1. Constitutional Law—Confrontation Clause—child sexual abuse

The underlying purpose of the Confrontation Clause is to ensure the reliability of evidence and to facilitate the fact-finding function of the trial court. However, the Confrontation Clause should not be read to categorically require confrontation in all cases; rather, the underlying purpose of the clause should be at the beginning and the end of the analysis. This is especially true in cases of child sexual abuse, where children are often incompetent or (as in this case) unavailable to testify.

2. Appeal and Error—preservation of issues—no ruling from trial court—proper objections

An issue was properly preserved for appeal where defendant never obtained a direct ruling on a Confrontation Clause argument from the trial court but made proper objections at the pretrial conference and again at trial and the testimony was allowed over defendant's objection.

3. Evidence—hearsay—medical exception—nurse's interview with victim

In a prosecution for sexual molestation of a child who was age nine or ten to fifteen, a nurse's questions reflected the primary purpose of attending to the victim's physical and mental health and his safety, or to protect someone else from abuse. The trial court did not err in admitting the interview into evidence under the medical diagnosis and treatment exception.

4. Constitutional Law—Confrontation Clause—sexually molested child—nurse's interview

Statements by a child who had been sexually molested were not given for the purpose of creating an out-of-court substitute for trial testimony despite the fact that all North Carolinians have a mandatory duty to report suspected child abuse. All of the factors indicated that the primary purpose of the nurse's interview was to safeguard the health of the child.

5. Constitutional Law—Confrontation Clause—sexually abused child—interviewer's primary purpose

In a prosecution for sexual molestation of a child in which Confrontation Clause issues were raised concerning the victim's statement's to others, a nurse's knowledge that her interview would be turned over to the police did not reflect an interrelationship with law enforcement. The test is whether the interviewer's primary purpose was to create a substitute for in-court testimony. Here, the nurse was a healthcare practitioner, not a person principally charged with uncovering and prosecuting criminal behavior.

6. Evidence—hearsay—sexually abused child's statements—excited utterance exception

In a prosecution for sexual molestation of a fifteen-year-old, the victim's disclosure to his mother was properly admitted under N.C.G.S. § 8C-1, Rule 803(2) as an excited utterance even though defendant contended that it was the result of reflective thought. While this victim was fifteen rather than four or five years of age and had tried to tell his allegations to another person, he was nevertheless a minor. Ultimately, the character of the transaction or event will largely determine the significance of the time factor in the excited utterance analysis. A declarant's statements can still be spontaneous, even when previously made to a different person, as long as there was sufficient evidence to establish that the declarant was under the stress of a startling event and had no opportunity to fabricate.

7. Evidence—relevancy—suicide of sexually abused child

There was no plain error in a prosecution for sexual abuse of a child, who committed suicide two years later, in the admission of expert testimony about a correlation between sexual abuse and suicidal ideation and that abused males are several times more likely to commit suicide than those not abused. Evidence of the victim's suicide was relevant as part of the narrative, the expert did not testify that the suicide was the direct result of defendant's acts, and other evidence regarding the suicide was admitted without objection.

8. Witnesses—expert—evaluation—effective date of Rule 702 amendment

The amendment to N.C.G.S. § 8C-1, Rule 702 concerning the evaluation of expert testimony applied only to defendants indicted after 1 October 2011 and was not applicable to a defendant who was indicted on 11 April 2011.

Appeal by defendant from orders entered 22 October 2014 by Judge Jeffrey P. Hunt in Cabarrus County Superior Court. Heard in the Court of Appeals 6 October 2015.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton and Assistant Attorney General Mary Carla Babb, for the State.

Marilyn G. Ozer for defendant-appellant.

BRYANT, Judge.

Where decedent's statements were admitted at trial for the primary purpose of obtaining a medical diagnosis, and not for the primary purpose of creating an out-of-court substitute for trial testimony, the Confrontation Clause of the Sixth Amendment is satisfied, and the trial court committed no error. Additionally, the trial court did not err in admitting out-of-court statements under the excited utterance exception to the hearsay rule. Finally, we find no plain error where the trial court admitted relevant testimony, and where there was otherwise overwhelming evidence to support the jury verdict.

Defendant sexually molested the victim, Preston,[1] over a period of approximately five to six years, starting when the victim was about nine or ten years old and ending when he was fifteen. Defendant did so at Preston's home, at defendant's home, and when taking Preston on outings and vacations to various places.

Preston was born on 22 August 1994 and was one of seven children. Preston's mother, Rebekah, described Preston at trial as a smart, funny, and caring child, who changed when he was approximately nine years old, in that he became sadder and anxious and began to isolate himself.

Rebekah met defendant while he was serving time in the same prison as her brother at the Quincy Correctional Institution in Tallahassee, Florida. Upon his release, defendant developed a close relationship with Preston's family and became known as "Uncle Doug." Beginning in 2003 or 2004, defendant took Preston several places, including trips to baseball games in Florida; to Massachusetts, Vermont, and Pennsylvania; to places in the North Carolina mountains for snowboarding; and to Daytona, Florida during Preston's spring breaks.

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1. A pseudonym will be used throughout as the victim was a minor when the abuse occurred. N.C. R. App. P. 3.1(b) (2015).

Defendant first sexually molested Preston after taking him to a baseball game in 2003 or 2004, when Preston was approximately nine years old. At that time, defendant gave Preston alcohol and touched him on his private parts. Starting when Preston was ten, defendant engaged Preston in oral sex, and starting when Preston was twelve, defendant began having anal sex with Preston. Defendant bought Preston anything he wanted, including video game consoles, a television, snowboarding gear, and clothing, as bribes for performing sex acts with defendant.

In July 2008, when Preston was thirteen, he and his family moved to Concord, North Carolina. That same year, defendant lost his job and his home. Beginning in March 2009, Rebekah allowed defendant to live with her family, helped him look for jobs, and assisted him financially. While living with Preston and his family, defendant helped care for Preston and continued to take him on trips. During some period of the time defendant lived with Preston's family, he shared a room with Preston. According to Rebekah, in October 2009, Preston indicated that he did not want defendant living in the house. In the fall or winter of 2009, defendant moved out but continued to take Preston on trips.

On 5 March 2010, defendant took Preston on a trip to Florida during his spring break. The night before, on 4 March 2010, defendant engaged Preston in performing fellatio. On their way to Florida, defendant and Preston spent the night in Brunswick, Georgia, where defendant attempted anal intercourse with Preston, but was unable to do so. From Brunswick, defendant and Preston traveled to Tampa, Florida. Thereafter, Preston spent the remainder of his spring break with his father in southern Georgia.

While staying with his father, Preston emailed his father and told him about the abuse, but his father did not check his email before Preston returned to North Carolina with defendant. On 14 March 2010, while Preston was riding home with defendant, he texted his mother: "As soon as I get home, we need to go for a drive." Rebekah explained that this was code that an important issue needed to be discussed privately. According to Rebekah, when Preston arrived home, he rushed into her room and told her, "We got to go now." At trial, Rebekah testified that when she and Preston went for their drive, he was very shaken and upset, and he seemed very nervous and scared. Upon being prompted by Rebekah, Preston told her that defendant had been "touching [him] inappropriately on [his] private parts and – more." Rebekah and Preston were both crying. When Rebekah asked what "more" meant, Preston told her that it meant he and defendant had oral sex. Preston also told

Rebekah that defendant told Preston he would kill him and his entire family if he disclosed any of the abuse.

Worried about Preston as well as about her other children who were at home with defendant at the time, Rebekah drove to the Concord Police Department, where she and Preston spoke with Detective Carlos Landers, who was assigned to investigate the case. Detective Landers then went to Preston's home and told defendant that the family wanted him to leave. Defendant complied and voluntarily went to the police department where he spoke with Detective Landers.

On 26 March 2010, Preston had an appointment at the Children's Advocacy Center ("CAC"), a department of the Jeff Gordon Children's Hospital in Carrabus County. CAC staff met with Preston to conduct a medical interview and give him a complete medical evaluation. Registered nurse Martha Puga conducted the interview portion of Preston's evaluation, which she videotaped. The recording became part of Preston's medical file. A DVD copy and transcript of Preston's interview were entered into evidence at trial over defendant's objection. During his interview with Nurse Puga, Preston recounted, among other things, details of the sexual abuse inflicted upon him by defendant, places where defendant molested him, and things defendant bought him in exchange for performing sex acts. Preston also told Nurse Puga that he was afraid of defendant, noting that when defendant got mad, he would become extremely violent and throw things across the room, and that on a few occasions, defendant picked Preston up by the hair and threw him on the bed.

The doctor who performed Preston's medical examination, Rosolena Conroy, M.D., testified at trial that an abused child's biggest fear is of the perpetrator and that, more specifically, the child fears the perpetrator will hurt him. Dr. Conroy noted that delayed disclosure of abuse was very common as, in order to make disclosures of sexual abuse, victims must overcome fear, obligation, guilt, and shame. She also testified that a disproportionately high number of child victims of sexual abuse go on to commit suicide and that these children experience a greater risk of abusing drugs and alcohol.

Dr. Conroy testified that it was her practice to first speak to the nurse about the history the nurse obtains, then to do a complete physical examination of the child. Dr. Conroy's assessment of Preston showed that his history was "extremely clear, concise, and detailed." Dr. Conroy testified that Preston's physical exam was normal, which was not surprising and

"very, very common." According to her, the lack of physical findings "did not negate his clear history of repeated sexual abuse."

On 19 April 2010, warrants were issued for defendant's arrest, charging him with five counts of statutory sexual offense and two counts of taking indecent liberties with a minor. However, they were not served on him until 30 March 2011 because defendant had left the State and gone to Florida. Defendant was indicted on 11 April 2011 for five counts of statutory sex offense and for two counts of taking indecent liberties with a minor.

After Preston made his disclosure of sexual abuse, he began having night terrors and punching holes in the walls. He kept knives under his bed and bats strategically placed around his room. Rebekah sought treatment for Preston at various facilities. Issues regarding Preston which Rebekah wanted addressed included (1) a suicide attempt by Preston; (2) physical violence at home (punching holes in the walls); (3) stealing from his parents; (4) loss of academic potential; (5) hanging around "drug people"; (6) sneaking out; (7) verbal abuse at home; (8) getting kicked out of school; (9) self-injurious behavior, such as cutting; and (10) criminal activity and legal problems, including a misdemeanor charge for possession of drug paraphernalia which was ultimately dismissed because of Preston's age.

In April 2010, Rebekah took Preston to see a licensed professional counselor, Susan Sikes, who saw him until April 2011. Sikes testified, among other things, that Preston indicated that he was sexually abused from age nine to fifteen, that it occurred for six years, and that it was the most significant trauma he had ever faced. Sikes also testified that Preston had checked "suicidal ideation" on his intake form and that he told her about one suicide attempt where he ingested white powder from a fluorescent light bulb.

In June 2012, when Preston was seventeen, Rebekah enrolled him in two in-patient facilities, the last of which was in California. There, the resident psychologists specialized in trauma and focused their treatment of Preston on his sexual abuse. After thirty days in the facility, on 6 July 2012, Preston committed suicide by hanging himself.

On 25 April 2014, a pretrial hearing was held regarding the State's motion to admit the victim's videotaped CAC interview and statements the victim made to his mother. Defendant objected based on hearsay and Confrontation Clause grounds. On 31 July 2014, the trial court entered a written order, ruling that the victim's videotaped statements

and statements to his mother would be admitted as exceptions to the hearsay rule.

The case came on for trial during the 13 October 2014 session of Cabarrus County Superior Court, the Honorable Jeffrey P. Hunt, Judge presiding. In addition to evidence of sexual abuse, the State submitted evidence that Preston committed suicide. Sikes testified about peer-reviewed articles and studies which indicated that there was a correlation between suicide and sexual abuse, that the risk of suicide increases with male victims, that the risk also increases with penetration, and that the risk is even higher when the perpetrator is a friend, family member, or person close to the victim. Sikes testified that based upon her experience and research Preston's disclosure of sexual abuse "certainly could be a factor in his suicide."

Preston's younger half-brother, Jonah,[2] also testified at trial that on three occasions defendant touched his penis by wrapping his fingers around it and moving his hand up and down. After the second time, defendant told Jonah that if he told anyone about what happened, defendant would hurt him. Jonah did not tell anyone at the time the abuse happened because he believed defendant's threats and was scared.

Defendant testified at trial on his own behalf and denied that he at any time threatened Preston or engaged in any sexual activity with or inappropriate touching of Preston or his half-brother Jonah.

On 22 October 2014, the jury found defendant guilty on all counts. As a prior record level IV, the trial court sentenced defendant to consecutive sentences of a minimum of 339 months and a maximum of 416 months for each of the five counts of statutory sex offense. Defendant was sentenced to a minimum of 25 months and a maximum of 30 months on each of the two counts of taking indecent liberties with a minor, to run consecutively with the statutory sex offense sentences. The trial court found that defendant was convicted of a criminal offense requiring sex-offender registration and imposed satellite-based monitoring for a period of thirty years after his release from prison. Defendant appeals.

On appeal, defendant argues that (I) allowing the jurors to use Preston's CAC interview in lieu of live testimony violated defendant's constitutional right to confrontation; (II) the trial court erred when it

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2. A pseudonym will be used as the victim was a minor when the abuse occurred. N.C. R. App. P. 3.1(b).

admitted Preston's statements to his mother under the excited utterance exception to the hearsay rule; and (III) the trial court erred when it denied defendant's motion to exclude the State from introducing evidence linking the suicide of Preston to acts of defendant.

I

[1] Defendant first argues that his constitutional right to confront his accuser was violated when the trial court allowed into evidence Preston's interview at the CAC in lieu of his live testimony. Specifically, defendant complains that the CAC interview violates the Confrontation Clause because the "primary purpose" of Preston's CAC interview was to verify abuse for the purpose of later prosecution and was, therefore, testimonial and inadmissible hearsay evidence. We disagree.

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. "The right to confront one's accusers is a concept that dates back to Roman times[,]" but the roots of the Sixth Amendment are generally traced back to English common law. *Crawford v. Washington*, 541 U.S. 36, 43, 158 L. Ed. 2d 177, 187 (2004) (citations omitted). Upon its inception, the Sixth Amendment was primarily geared towards "prevent[ing] depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness . . . ." *Mattox v. United States*, 156 U.S. 237, 242, 39 L. Ed. 409, 411 (1895); *see also Crawford*, 541 U.S. at 43–50, 158 L. Ed. 2d at 187–92 (providing a thorough historical background of the Confrontation Clause); *State v. Webb*, 2 N.C. 103, 103–04 (Super. L. & Eq. 1794) (per curiam) (holding that where defendant was on trial for horse-stealing depositions taken in his absence were not permitted to be read against him: "no man shall be prejudiced by evidence which he had not the liberty to cross examine").

With regard to the advent of the hearsay rule, "[b]etween 1700 and 1800 the rules regarding the admissibility of out-of-court statements were still being developed." *Crawford*, 541 U.S. at 73, 158 L. Ed. 2d at 206. Even Justice Scalia, the author of the majority opinion in *Crawford* and well-known for his originalist position when it comes to constitutional interpretation, acknowledged that "[t]here were always exceptions to the general rule of exclusion . . . . It is one thing to trace the right of confrontation back to the Roman Empire; it is quite another to conclude that such a right absolutely excludes a large category of evidence." *Id.* Indeed,

> [e]xceptions to confrontation have always been derived from the experience that some out-of-court statements are just as reliable as cross-examined in-court testimony due to the circumstances under which they are made. . . . [F]or example, . . . [b]ecause [co-conspirator] statements are made while the declarant and accused are partners in an illegal enterprise, the statements are unlikely to be false and their admission actually furthers the Confrontation Clause's very mission which is to advance the accuracy of the truth-determining process in criminal trials. . . . Similar reasons justify the introduction of . . . *statements made in the course of procuring medical services* . . . . That a statement might be testimonial does nothing to undermine the wisdom of one of these exceptions.

Id. at 74, 158 L. Ed. 2d at 206–07 (emphasis added) (internal citations and quotation marks omitted).

While it is well-established that there is "wisdom" to these hearsay exceptions, *see id.*, it is similarly settled that, while "the Confrontation Clause and rules of hearsay may protect similar values, it would be an erroneous simplification to conclude that the Confrontation Clause is merely a codification of hearsay rules." *State v. Jackson*, 348 N.C. 644, 649, 503 S.E.2d 101, 104 (1998) (citing *California v. Green*, 399 U.S. 149, 155, 26 L. Ed. 2d 489, 495 (1970)). "Evidence admitted under an exception to the hearsay rule may still violate the Confrontation Clause." *Id.* (citation omitted); *see also Crawford*, 541 U.S. at 51, 158 L. Ed. 2d at 192 ("[*E*]*x parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.").

At the same time, the U.S. Supreme Court in *Crawford* did acknowledge that "[t]he [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." 541 U.S. at 59 n.9, 158 L. Ed. 2d at 198 n.9 (citing *Tennessee v. Street*, 471 U.S. 409, 414, 85 L. Ed. 2d 425, 431 (1985)); *State v. Ortiz-Zap*e, 367 N.C. 1, 6, 743 S.E.2d 156, 160 (2013) (quoting *Crawford*). In doing so, *Crawford* recognized that most of the exceptions to the hearsay rule cover statements that by their nature are not testimonial and, therefore, do not present a Confrontation Clause problem. 541 U.S. at 56, 158 L. Ed. 2d at 195–96 ("[T]here is scant evidence that [hearsay] exceptions were invoked to admit *testimonial* statements against the accused in a *criminal* case. Most of the hearsay exceptions covered statements that by their nature were not testimonial—for

example, business records or statements in furtherance of a conspiracy." (footnote omitted)).

Moving beyond a historical or literal interpretation of the Confrontation Clause, the U.S. Supreme Court, for decades before its decision in *Crawford*, had consistently conceptualized the Sixth Amendment as a substantive guarantee of the reliability of evidence. *See*, *e.g.*, *Ohio v. Roberts*, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 608 (1980) ("[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."); *Idaho v. Wright*, 497 U.S. 805, 819–20, 111 L. Ed. 2d 638, 655 (1990) (holding that hearsay evidence admitted under the Confrontation Clause's "particularized guarantees of trustworthiness" requirement must be so trustworthy that cross-examination of declarant would be of marginal utility). It was not until the U.S. Supreme Court's opinion in *Crawford* that a defendant's right to confront his accuser was treated as a procedural requirement:

> To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

541 U.S. at 61–62, 158 L. Ed. 2d at 199 (citations omitted).

While *Crawford* acknowledges that the "ultimate goal" of the Confrontation Clause is to ensure reliability, it nevertheless mandates strict adherence to the black letter of the Clause itself when testimonial, out-of-court statements are at issue, requiring that "[t]estimonial statements of witnesses absent from trial [be] admitted only where the declarant is *unavailable*, and only where the defendant has had a *prior opportunity to cross-examine*." *Id.* at 59, 158 L. Ed. 2d at 197; *see also State v. Jackson*, 216 N.C. App. 238, 241, 717 S.E.2d 35, 38 (2011) (citation omitted) ("The elements of confrontation include the witness's: physical presence; under-oath testimony; cross-examination; and exposure of his demeanor to the jury."). Accordingly, Confrontation Clause analysis begins with a determination of whether or not an out-of-court

statement is testimonial or nontestimonial. *See Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203.

"[W]hen the hearsay statement at issue [is] not testimonial," the U.S. Supreme Court has "considered reliability factors beyond prior opportunity for cross-examination . . . ." *Id.* at 57, 158 L. Ed. 2d at 196 (citing *Dutton v. Evans*, 400 U.S. 74, 87–89, 27 L. Ed. 2d 213, 226–27 (1970) (plurality opinion)). However, "[w]here testimonial statements are involved, . . . the Framers [did not mean] to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.' " *Id.* at 61, 158 L. Ed. 2d at 199.

Unfortunately, *Crawford* declined to go any further in clarifying the precise difference between testimonial and nontestimonial statements for purposes of Confrontation Clause analysis other than stating as follows:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does [*Ohio v.*] *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

Id. at 68, 158 L. Ed. 2d at 203 (footnote omitted). Indeed, the U.S. Supreme Court, on "another day," did further define testimonial statements, although in the limited context of statements made to police officers:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation

> is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 822, 165 L. Ed. 2d 224, 237 (2006). However, the existence of an ongoing emergency is not dispositive to the issue of whether the statement is testimonial in nature. *Michigan v. Bryant*, 562 U.S. 344, 366, 179 L. Ed. 2d 93, 112 (2011). Rather, "whether an ongoing emergency exists is simply one factor—albeit an important factor—that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation." *Id.*

Most recently, the U.S. Supreme Court has proceeded to establish the test for statements made to individuals who are not law enforcement officers: "In the end, the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.' " *Ohio v. Clark*, ___ U.S. ___, ___, 192 L. Ed. 2d 306, 315 (2015) (alteration in original) (quoting *Bryant*, 562 U.S. at 358, 179 L. Ed. 2d at 107). In determining the "primary purpose" of the conversation, "[c]ourts must evaluate challenged statements in context, and part of that context is the questioner's identity." *Id.* at ___, 192 L. Ed. 2d at 317 (citation omitted); *see also State v. Lewis*, 360 N.C. 1, 21, 619 S.E.2d 830, 843 (2005) (stating that "an additional prong of the analysis for determining whether a statement is 'testimonial' is, considering the surrounding circumstances, whether a reasonable person in the declarant's position would know or should have known his or her statements would be used at a subsequent trial" and that "[t]his determination is to be measured by an objective, not subjective, standard"), *vacated and remanded*, *Lewis v. North Carolina*, 548 U.S. 924, 165 L. Ed. 2d 985 (2006) (remanding for further consideration in light of *Davis v. Washington*, 547 U.S. 813, 165 L. Ed. 2d 274 (2006)).

Based on all of the foregoing—from the history of the Confrontation Clause, rooted in Roman times and the English common law, to the Clause's shifting jurisprudence in the U.S. Supreme Court's opinions in *Crawford* (holding that reliability must be assessed by "testing in the crucible of cross-examination"), *Davis* (defining when statements to law enforcement are "testimonial"), and *Clark* (prohibiting out-of-court statements introduced for the primary purpose of providing a substitute for in-court testimony)—we conclude that the Confrontation Clause should not be read to categorically require confrontation in all cases; rather, in determining what the Clause does require, the underlying purpose of the Clause should be at the beginning and the end of the analysis.

The underlying purpose of the Confrontation Clause is to ensure the reliability of evidence and to facilitate the fact-finding function of the trial court. It is this purpose—ensuring the reliability of evidence—that should be at the forefront of the analysis. This is especially true in cases of child sexual abuse, where children are often incompetent or (as in this case) unavailable to testify. The purpose of the Confrontation Clause should not be subverted by such strict adherence to its language regarding "confrontation" where the purpose of the Clause is otherwise satisfied.

"The physical presence, or 'face-to-face,' requirement embodies the general Confrontation Clause protection of an accused's 'right [to] physically face those who testify against him.' " *Jackson*, 216 N.C. App. at 241, 717 S.E.2d at 38 (alteration in original) (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 51, 94 L. Ed. 2d 40, 53 (1987)). "But, this general rule 'must occasionally give way to considerations of public policy and the necessities of the case.' " *Id.* (quoting *Mattox*, 156 U.S. at 243, 39 L. Ed. at 411).

Keeping in mind the ultimate goal of the Sixth Amendment, the Clause's purpose may be satisfied by taking into consideration the totality of the circumstances, including, but not limited to, the following: (1) statements which are admitted that are by their nature nontestimonial; (2) statements which fall under an exception "derived from the experience that some out-of-court statements are just as reliable as cross-examined in-court testimony due to the circumstances under which they were made," like those made for the purpose of medical diagnosis or treatment, *see Crawford*, 541 U.S. at 74, 158 L. Ed. 2d at 206; (3) to whom the out-of-court statement was made, *see Clark*, ___ U.S. at ___, 192 L. Ed. 2d at 317; *Davis*, 547 U.S. at 822, 165 L. Ed. 2d at 237; (4) the "primary purpose" for which the out-of-court statement was made, *see Bryant*, 562 U.S. at 366, 179 L. Ed. 2d at 112; (5) the primary purpose for which the out-of-court statement is offered at trial, *see Clark*, ___ U.S. at ___, 192 L. Ed. 2d at 316; and (6) public policy concerns, *i.e.*, "balanc[ing] the need for child sex crime victims' testimony against the risk of engendering further emotional distress." *Jackson*, 216 N.C. App. at 38, 717 S.E.2d at 241 (citation omitted); *see also Maryland v. Craig*, 497 U.S. 836, 852–53, 111 L. Ed. 2d 666, 683 (1990) (deeming the interest in safeguarding child abuse victims from further trauma to be a compelling one that, depending on the necessities of the case, may outweigh a defendant's right to face his accusers in court). None of the aforementioned considerations should be considered dispositive; rather, they should inform the court's analysis in keeping with the true guarantee of the Confrontation Clause—to ensure the trustworthiness of the evidence presented to the court and the jury.

Returning to defendant's argument—that his constitutional right to confront his accuser was violated when the trial court allowed into evidence Preston's CAC interview in lieu of his live testimony—we directly address, as a threshold matter, the State's argument that defendant failed to preserve this issue for appeal.

[2] At the conclusion of the 25 April 2014 hearing on the admissibility of the victim's videotaped CAC interview, the trial court, with consent of the parties, reserved final ruling on the hearsay and Confrontation Clause issues presented. Instead, the court limited its ruling because the judge presiding over the hearing, the Honorable C.W. Bragg, was not certain he would be the judge presiding at trial. In fact, the Honorable Jeffrey P. Hunt presided over the trial.

Despite defendant's arguments during the 25 April 2014 pretrial conference regarding defendant's Sixth Amendment rights and objections to the admission of the CAC interview as testimonial evidence in a written order dated 31 July 2014, the trial court ruled that it was admissible as a statement made for medical diagnosis or treatment. The written order ruled on the hearsay argument but not on any Confrontation Clause grounds.

At trial, defendant renewed his objections to the CAC interview: "I would ask the Court to note my objection. I'd rest on my previous arguments and any arguments I've made subsequent to the Court that have been recorded in our previous discussion outside the presence of the jury."

The State argues, although on different grounds, that defendant failed to preserve his Confrontation Clause argument for appeal. Specifically, the State argues that defendant waived review of the Confrontation Clause issue by failing to obtain a ruling pursuant to N.C. R. App. 10(a)(1) (2013). While defendant never obtained a direct ruling on the Confrontation Clause argument from the trial court, because defendant made proper objections at the pretrial conference and again at trial, and because the testimony was allowed over defendant's objection, we determine the issue was properly preserved for appeal.

[3] Proceeding to the merits of defendant's argument, defendant contends that the trial court's admission of the CAC interview under the medical diagnosis or treatment exception to the hearsay rule violated his constitutional right to confrontation and further that Preston's statements made to Nurse Puga were testimonial, inadmissible hearsay in light of her mandatory duty to report child abuse under North Carolina law. [R. at 39]. We disagree.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted).

N.C. Gen. Stat. § 8C-1, Rule 803(4), states as follows:

> (4) **Statements for Purposes of Medical Diagnosis or Treatment**—Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

N.C. Gen. Stat. § 8C-1, Rule 803(4) (2015). "The test to determine whether statements are admissible under Rule 803(4) is a two-part test: '(1) whether the declarant's statements were made for purposes of medical diagnosis or treatment; and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment.' " *State v. Burgess*, 181 N.C. App. 27, 35, 639 S.E.2d 68, 74 (2007) (quoting *State v. Hinnant*, 351 N.C. 277, 284, 523 S.E.2d 663, 667 (2000)) (finding the defendant's *Crawford* argument unpersuasive where child sex abuse victims' videotaped interviews were admitted at trial and where each took the stand and was available for cross-examination). "Testimony meeting this test is considered inherently reliable because of the declarant's motivation to tell the truth in order to receive proper treatment." *Id.* (citation omitted) (internal quotation marks omitted). The proponent of such testimony must establish "that the declarant made the statements understanding that they would lead to medical diagnosis or treatment." *Id.* (citation omitted).

Notably, in an opinion following *Crawford*, this Court held that a young child's statements to medical personnel regarding sexual abuse were not testimonial and the defendant's confrontation rights were not violated where the child was deemed unavailable to testify pursuant to N.C. Gen. Stat. § 8C-1, Rule 804(b)(5). *State v. Brigman*, 178 N.C. App. 78, 87–88, 91, 632 S.E.2d 498, 505–07 (2006). In "considering the surrounding circumstances," this Court in *Brigman* held that it could not "conclude that a reasonable child under three years of age would know or should know that his statements might later be used at trial." *Id.* at 90–91, 632 S.E.2d at 506.

Even where, as here, the child is older (fifteen), an objective determination of this record does not lead to the assumption that the victim might reasonably be expected to "know that his statements might later

be used at trial." *See id.* at 91, 632 S.E.2d at 506. It is particularly this Court's "consider[ation of] the surrounding circumstances" that is significant to its Confrontation Clause analysis in light of *Crawford*. *Id.* at 90–91, 632 S.E.2d at 506–07. In other words, "considering the surrounding circumstances" in the instant case not only includes looking at the age of the declarant, but also examining other factors, such as the primary purpose for which the statements were made. *See id.*

Here, Nurse Puga's questions in the CAC interview reflected the primary purpose of attending to the victim's physical and mental health and his safety: she explained to Preston that he was there for a checkup; she asked Preston if he had any health issues, took medicine, had had any accidents, broken bones, scars, surgeries, hospitalizations, or infections. She emphasized to Preston the importance of knowing what had happened from beginning to end so they could make sure he did not have any diseases or other issues that could affect him for the rest of his life.

Defendant complains that some of the questions asked, such as the importance of telling the truth, were not pertinent to medical diagnosis or treatment. However, these questions were crucial to establishing a rapport with the victim and impressing upon him the need to be open and honest about very personal and likely embarrassing details pertinent to his well-being. Likewise, having the victim relate the details from beginning to end helped the medical practitioners to evaluate the extent of the mental and physical trauma to which the victim was exposed, inquire as to whether the victim was out of danger, and discover whether other abusers or victims may have been involved.[3] Similar to instances where the "statements occurred in the context of an ongoing emergency involving suspected child abuse[,]" *Clark*, ___ U.S. at ___, 192 L. Ed. 2d at 315, here, the detailed statements were necessary to determine the extent to which it was medically necessary to protect the victim's physical and mental health, or to protect someone else from child sexual abuse. Accordingly, the statements were not inadmissible hearsay, and the trial court did not err in admitting the CAC interview into evidence under the medical diagnosis and treatment exception to the hearsay rule.

[4] Defendant also argues that because all North Carolinians have a mandatory duty to report suspected child abuse to the Department of Social Services ("DSS"), *see* N.C. Gen. Stat. § 7B-301 (2015), Preston's

3. Indeed, in *Clark*, just as in the present case, there turned out to be a sibling who was also abused and in need of protection. *See* ___ U.S. at ___, 192 L. Ed. 2d at 312, 315.

statements in the CAC interview are testimonial in nature and were made for the primary purpose of later prosecution. Defendant reaches the categorical conclusion that, because of the mandatory reporting law, "[w]hen questioning a child about suspected abuse, the Child Advocacy Center employee acts in a dual capacity as a health worker and as an agent of the state for law-enforcement purposes." We disagree.

In *Clark*, the defendant unsuccessfully argued that a three-year-old child's out-of-court statements made to his preschool teacher were testimonial in light of the teacher's mandatory duty to report child abuse to authorities under Ohio law.[4] ___ U.S. at ___, 192 L. Ed. 2d at 317. The U.S. Supreme Court in *Clark* has summarily rejected this argument: "[M]andatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for prosecution." *Id.* ("[The defendant] emphasizes Ohio's mandatory reporting obligations, in an attempt to equate [the victim's] teachers with the police and their caring questions with official interrogations. But the comparison is inapt. . . . It is irrelevant that the teachers' questions and their duty to report the matter had a natural tendency to result in [the defendant's prosecution.").

Thus, the mere fact that CAC employees have a mandatory duty to report suspected child abuse does not transform the primary purpose of the CAC interview into one intended to create an out-of-court substitute for trial testimony.[5] Rather, all of the factors here and discussed previously indicate that the primary purpose of the interview was to

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4. "Under Ohio law, children younger than 10 years old are incompetent to testify if they 'appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.' " *Clark*, ___ U.S. at ___, 192 L. Ed. 2d at 312 (quoting Ohio Rule Evid. 601(A) (Lexis 2010)).

5. We do not posit that the CAC interview is a substitute for in-court testimony, but, where, as here, the declarant is unavailable, his video recorded medical interview is sufficiently reliable to be admissible. Therefore, the jury is able to assess the testimony, to observe the demeanor of the declarant, to determine the credibility and trustworthiness of his statements, and thereby perform their function as a jury. This helps satisfy the ultimate goal of the Confrontation Clause. *See Idaho v. Wright*, 497 U.S. 805, 821–22, 111 L. Ed. 2d 638, 656 (1990) ("The state and federal courts have identified a number of factors that we think properly relate to whether hearsay statements made by a child witness in child sexual abuse cases are reliable. *See*, *e.g.*, *State v. Robinson*, 153 Ariz. 191, 201, 735 P.2d 801, 811 (1987) (spontaneity and consistent repetition); *Morgan v. Foretich*, 846 F.2d 941, 948 (CA4 1988) (mental state of the declarant); *State v. Sorenson*, 143 Wis. 2d 226,

safeguard the mental and physical health of the child, and not for creating a substitute for in-court testimony.

[5] Defendant also maintains that Nurse Puga's knowledge that her interview would be turned over to the police, as well as some of the questions she asked, reflect an interrelationship between the CAC and law enforcement. Again, this is not the test. The test is whether the interviewer's primary purpose was to create a substitute for in-court testimony. *See id.* at ___, 192 L. Ed. 2d at 314. Here, Nurse Puga is a healthcare practitioner, not a person principally charged with uncovering and prosecuting criminal behavior. "Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers." *Id.* at ___, 192 L. Ed. 2d at 317 (citation omitted).

Here, as in *Clark*, "[a]t no point did [Nurse Puga] inform [Preston] that his answers would be used to arrest or punish his abuser." *Id.* at ___, 192 L. Ed. 2d at 316. Furthermore, it was not anticipated that the declarant would not be available to testify at trial, not to mention the tragic circumstances that caused his unavailability. In fact, the record is replete with references to Preston's general eloquence and intelligence, and it is not likely that he would have been declared incompetent to testify at trial, particularly considering his age and understanding of the importance of telling the truth. *Cf. State v. Waddell*, 351 N.C. 413, 421–22, 527 S.E.2d 644, 650 (2000) (noting that child victim of sexual abuse was incompetent to testify at trial where he did not understand the need to tell the truth).

Defendant maintains that an analysis of the primary purpose of the CAC interview must begin with who sent the victim to the CAC. Contrary to defendant's assumptions about the relevance of the referral,

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246, 421 N.W.2d 77, 85 (1988) (use of terminology unexpected of a child of similar age); *State v. Kuone*, 243 Kan. 218, 221–22, 757 P.2d 289, 292–93 (1988) (lack of motive to fabricate). Although these cases (which we cite for the factors they discuss and not necessarily to approve the results that they reach) involve the application of various hearsay exceptions to statements of child declarants, we think the factors identified also apply to whether such statements bear 'particularized guarantees of trustworthiness' under the Confrontation Clause. These factors are, of course, not exclusive, and courts have considerable leeway in their consideration of appropriate factors. We therefore decline to endorse a mechanical test for determining 'particularized guarantees of trustworthiness' under the Clause. *Rather, the unifying principle is that these factors relate to whether the child declarant was particularly likely to be telling the truth when the statement was made.*" (emphasis added)), *overruling recognized by Desai v. Booker*, 732 F.3d 628 (6th Cir. 2013).

Dr. Conroy, who conducted Preston's medical exam following Nurse Puga's interview, expressly testified that regardless of who makes the referral, she is still going to assess the whole child and obtain the same information; that her examination is not law-enforcement-driven in any way; that the CAC receives referrals from many sources, and often gets multiple referrals; that while in this particular case, she recalled law enforcement making the referral, this did not change the examination.

Defendant's constitutional argument fails where circumstances objectively reflect that (1) the primary purpose of the CAC interview was to promote the victim's health and well-being; (2) the statements were made to a nurse, not law enforcement, notwithstanding the nurse's mandatory duty to report suspected abuse to law enforcement; (3) the statements were not intended primarily for purposes of prosecution; and (4) the CAC interview was admitted under an exception for statements made in the course of obtaining medical diagnosis or treatment—the wisdom of which has been long recognized. *See Crawford*, 541 U.S. at 74, 158 L. Ed. 2d at 206. Accordingly, defendant's arguments are overruled.

II

[6] Defendant next argues that the trial court erred in admitting Preston's 14 March 2010 statements to his mother under the excited utterance hearsay exception, arguing instead that the statements were inadmissible hearsay. We disagree.

"The trial court's determination as to whether an out-of-court statement constitutes hearsay is reviewed de novo on appeal." *State v. Castaneda*, 215 N.C. App. 144, 147, 715 S.E.2d 290, 293, (2011) (citation omitted).

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2015). The excited utterance hearsay exception allows admission of out-of-court statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." N.C. Gen. Stat. § 8C-1, Rule 803(2) (2015). To qualify as an excited utterance, the statement must relate to "(1) a sufficiently startling experience suspending reflective thought and (2) [be] a spontaneous reaction, not one resulting from reflection or fabrication." *State v. Maness*, 321 N.C. 454, 459, 364 S.E.2d 349, 351 (1988) (citation omitted). Additionally, "[a]lthough the requirement for spontaneity is often measured in terms of the time lapse between the startling event

and the statement, . . . the modern trend is to consider whether the delay in making the statement provided an opportunity to manufacture or fabricate the statement." *State v. Smith*, 315 N.C. 76, 87, 337 S.E.2d 833, 841 (1985) (citation omitted) (internal quotation marks omitted).

Defendant argues that Preston's disclosure to his mother does not fall within the excited utterance hearsay exception as it was a product of reflective thought. Defendant argues that because there was a ten-day gap between the last incident of sexual abuse on 4 March 2010 and Preston's statements to Rebekah on 14 March 2010, Preston had time for reflective thought. We disagree.

At the 25 April 2014 pretrial hearing, the trial court examined the admissibility of Preston's 14 March 2010 statements to Rebekah made immediately upon returning to Florida. Rebekah testified that when Preston arrived home with defendant, Preston came into the house "frantically" and was "shaking" while telling her, "You got to call the police right now." According to Rebekah, when she asked Preston, "Why? For what? What's wrong," Preston said, "It's [defendant]." Rebekah stated that she and Preston "got right in the car, and he told her right away" about the abuse. The trial court issued a detailed order concluding Preston's statements to Rebekah were admissible as excited utterances and, alternatively, could be used to corroborate his statements to Nurse Puga.

The excited utterance exception applies after a delay typically in cases involving young children, as "the stress and spontaneity upon which the exception is based is often present for longer periods of time in young children than adults." *Id.* (citation omitted); *see id.* at 88, 337 S.E.2d at 842 (granting leeway with time element where declarant/victims were four- and five-year-olds making utterances two or three days after abuse, and holding that "[s]pontaneity and stress are the crucial factors," rather than time). Additionally, the North Carolina appellate courts have granted leeway with young child victims not only because they generally lack the capacity to fabricate, but also because they "may not make immediate complaint because of threats, fear of reprisals, admonishments of secrecy, or other pressures not to disclose, particularly where . . . the child had a close relationship with the offender." *Id.* at 89, 337 S.E.2d at 842 (citation omitted) (internal quotation marks omitted).

The situation here is not necessarily in accord with cases granting more leeway with the time element of the excited utterance analysis because the declarants therein were children much younger than Preston, who was fifteen years old. *See, e.g.*, *id.* at 88, 337 S.E.2d at 842. However, while this victim was fifteen rather than four or five years of

age, he was nevertheless a minor and that fact should not be disregarded in the analysis.

Additionally, defendant contends that because Preston first tried communicating the allegations regarding the abuse to his father via email, his later statements to his mother fall outside the range of admissible excited utterances. Specifically, defendant argues that Preston's statement to his mother was the product of reflective thought based on Preston's explanation to Nurse Puga regarding his decision to reveal the abuse:

> [Puga]: Okay, and tell me about what made you finally decide to, like, to disclose when you came back?
>
> [Preston]: Well, again, my dad, he's just, oh, when I came back? See, now I know, um, my dad didn't say anything about it that day because he didn't read his email, so I figured I have to tell someone right now. So I told my mom.
>
> [Puga]: And what, how did you decide this was the time to tell, to, to do something?
>
> [Preston]: She has, I mean, I hadn't had any stronger feelings about it over the last few years because, I mean, if I tell someone I'm gonna be super scared. But if I caught, you know, [defendant] whatever he is called on a good note, he wouldn't think anything's up, and, um, I figured, you know, now is the time. You know, in the military strategy there's always a time to strike.
>
> [Puga]: Uh huh.
>
> [Preston]: Well, that was the time.

However, a declarant's statements can still be spontaneous, even where he previously made the same ones to a different person, as long as there was, as there was here, sufficient evidence to establish that the declarant was under the stress of a startling event and had no opportunity to fabricate. *See State v. Coria*, 131 N.C. App. 449, 452, 508 S.E.2d 1, 3 (1998) (concluding statements made to police officer by a seventeen-year-old victim of physical abuse by her father were exited utterances, even though the victim had previously made similar statements to another person). Additionally, defendant's argument that Preston's explanation demonstrated reflective thought ("in military strategy there's always a time to strike"), is unpersuasive where the trial evidence overwhelmingly established that Preston feared reprisal from

defendant for his disclosure—as he had received threats from defendant in the past—and which undoubtedly delayed disclosure.

As stated previously, until some event prompts them to disclose, children generally delay disclosure "because of threats, fear of reprisals, admonishments of secrecy, or other pressures not to disclose." *Smith*, 315 N.C. at 89, 337 S.E.2d at 842.

Defendant argues that the critical question at issue in determining the admissibility of these statements under Rule 803(2) is why Preston decided to reveal the abuse to his mother days after the last incident. However, defendant's narrow analysis of the issue does not account for the five-to-six-year pattern of sexual abuse, concluding in an incident occurring ten days prior to Preston's excited utterances. It does not account for the fact that Preston was afraid of defendant, defendant had been violent towards Preston in the past, and during the return trip home, defendant had been "extremely pissed" at Preston.

Defendant's narrow analysis also does not account for the fact that Preston made his statements immediately upon leaving the custody of the person who had sexually abused him for the past several years. *See State v. Jones*, 89 N.C. App. 584, 595, 367 S.E.2d 139, 146 (1988) (concluding that statements by a child concerning sexual abuse were spontaneous because they were made only ten hours after child left abuser's custody), *overruled on other grounds by Hinnant*, 351 N.C. at 287, 523 S.E.2d at 669 (overruling based on the analysis in *Jones* regarding statements made for purposes of medical diagnosis or treatment). Ultimately, " 'the character of the transaction or event will largely determine the significance of the time factor' " in the excited utterance analysis. *State v. Kerley*, 87 N.C. App. 240, 243, 360 S.E.2d 464, 466 (1987) (quoting Rule 803(2) official commentary). Based on the foregoing analysis, we hold that Preston's statements to his mother were properly admitted under Rule 803(2) as excited utterances. Defendant's hearsay challenge is overruled.

III

[7] Lastly, defendant argues that the trial court plainly erred in admitting evidence linking Preston's suicide to the sexual abuse. Specifically, defendant challenges testimony from counselor Susan Sikes regarding "the likelihood of an abused child committing suicide," and that Preston's disclosure of sexual abuse "certainly could be a factor in his suicide." Defendant argues that (1) evidence regarding Preston's suicide was not relevant, and even if relevant, was grossly prejudicial; and (2) Sikes's

testimony did not meet the admissibility standards of amended Rule of Evidence 702(a) in that Sikes was not qualified to give that testimony.

Defendant's counsel did not object to Sikes's testimony as to the link between Preston's suicide and sexual abuse. Therefore, the issue is whether introduction of her opinion constituted plain error:

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (alteration in original) (internal citations and quotation marks omitted).

Defendant argues that any evidence alluding to or linking the suicidal death of Preston to any acts of defendant was irrelevant, or alternatively, even if relevant, any probative evidence regarding the suicide was substantially outweighed by the danger of unfair prejudice.

Only relevant evidence is admissible at trial. N.C. Gen. Stat. § 8C-1, Rule 402 (2015). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2015). Relevant evidence may be admissible if the probative effect of the evidence is substantially outweighed by the danger of unfair prejudice. N.C. Gen. Stat. § 8C-1, Rule 403 (2015).

Preston made his allegations of sexual abuse in March 2010. Two years later he committed suicide while he was an in-patient in a medical treatment center. At the pretrial hearing, the trial court ruled on defendant's motion *in limine* to exclude evidence directly linking Preston's suicide to the acts of defendant, stating that "the State is prohibited in this trial, either side, from saying definitively that the suicide was caused by any particular causation."

At trial, Sikes, a licensed professional counselor who counseled children and victims of sexual abuse, was offered and received as an expert in professional counseling. Sikes did not testify that Preston's

suicide was a direct result of defendant's acts. Rather, she testified to the correlation between sexual abuse and suicidal ideation and cited to various peer-reviewed studies which found that sexually abused males are four to eleven times more likely to exhibit suicidal ideation and behaviors than males who have not experienced sexual abuse.

Evidence of and relating to Preston's suicide was relevant in this case because, although not necessarily part of defendant's commission of the actual crime, it "form[ed] an integral and natural part of an account of the crime, [and was] necessary to complete the story of the crime for the jury." *State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174–75 (1990) (citation omitted). Furthermore, defendant cannot establish that "a fundamental error occurred at trial," meaning one that "had a probable impact on the jury's finding that [he] was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. This is primarily because evidence concerning the likelihood of a child abuse victim being suicidal, as well as evidence specifically regarding Preston's suicidal ideation, his attempt, and the suicide itself, was all admitted through other witnesses as well as parts of Sikes's own testimony, to which defendant did not object to at trial. Accordingly, even if we agree that evidence of Preston's suicide was relevant but nevertheless prejudicial, we find no plain error where there was other overwhelming evidence from which the jury could have arrived at the same verdict—that defendant sexually abused the victim.

[8] Defendant next argues that the portion of Sikes's testimony on the link between sexual abuse and suicide came before the jury without being evaluated under the standard set out in amended Rule 702. Defendant was indicted on 11 April 2011, and the amendment to Rule 702 applies only to defendants indicted after 1 October 2011. *See* N.C. Gen. Stat. § 8C-1, Rule 702 (2015), 2011 N.C. Sess. Laws 2011-283, § 1.3, eff. Oct. 1, 2011. Thus, the amendment to Rule 702 is inapplicable to defendant. This argument is wholly without merit. Accordingly, defendant's argument is overruled.

NO ERROR.

Judges CALABRIA and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
AUSTIN LYNN MILLER

No. COA15-636

Filed 15 March 2016

1. Drugs—pseudoephedrine—strict liability—plain language

The Legislature intended that a new statutory subsection concerning pseudoephedrine, N.C.G.S. § 90-95(d1)(1)(c), be a strict liability offense without any element of intent where the General Assembly specifically included intent elements in each of the other, previously enacted subsections of section 90-95(d1) but not in the new subsection.

2. Constitutional Law—pseudoephedrine—due process—notice

A new statutory subsection, N.C.G.S. § 90-95(d1)(1)(c), concerning pseudoephedrine, was unconstitutional as applied to defendant in the absence of notice to the subset of convicted felons (which included this defendant) whose otherwise lawful conduct was criminalized, or proof beyond a reasonable doubt by the State that this particular defendant was aware that his possession of a pseudoephedrine product was prohibited by law. The new subsection was a strict liability offense that criminalized otherwise innocuous and lawful behavior without providing defendant notice that those acts were now crimes.

On writ of *certiorari* to review judgment dated 4 February 2015 by Judge Eric C. Morgan in Watauga County Superior Court. Heard in the Court of Appeals 18 November 2015.

Attorney General Roy Cooper, by Assistant Attorney General Jill F. Cramer, for the State.

Jeffery William Gillette for Defendant.

STEPHENS, Judge.

The sole issue presented by this appeal is one of first impression: whether Defendant Austin Lynn Miller's conviction under subsection 90-95(d1)(1)(c) of our North Carolina General Statutes, which makes possession of a product containing pseudoephedrine by any person

previously convicted of possessing methamphetamine a class H felony, violated his due process rights. For the reasons which follow, we hold that Miller's due process rights under the United States Constitution were violated by his conviction of a strict liability offense criminalizing otherwise innocuous and lawful behavior without providing him notice that a previously lawful act had been transformed into a felony for the subset of convicted felons to which he belonged.

Factual and Procedural History

Like the legislative branches of many other states across the nation, our General Assembly has passed various laws over the past three decades seeking to combat the scourge of methamphetamine abuse. Each of the provisions discussed herein falls under Article 5, Chapter 90 of our General Statutes: the North Carolina Controlled Substances Act ("the CSA"). Pertinent to this case, effective 1 January 2012, section 90-113.52A of the CSA ("the record-keeping statute") mandated electronic record keeping by retail stores that sell products containing pseudoephedrine, an essential ingredient in the manufacture of methamphetamine. Subsection (a) of the record-keeping statute provides that "[a] retailer shall, before completing a sale of a product containing a pseudoephedrine product, electronically submit the required information to the National Precursor Log Exchange (NPLEx) administered by the National Association of Drug Diversion Investigators (NADDI)[.]" N.C. Gen. Stat. § 90-113.52A(a) (2013). In turn, subsection (c) of the record-keeping statute specifies that "NADDI shall forward North Carolina transaction records in NPLEx to the State Bureau of Investigation weekly and provide real-time access to NPLEx information through the NPLEx online portal to law enforcement in the State . . . ." N.C. Gen. Stat. § 90-113.52A(c). Finally, the General Assembly mandated that the record-keeping "system shall be capable of generating a stop sale alert, which shall be a notification that completion of the sale would result in the seller or purchaser violating the quantity limits set forth in [section] 90-113.52."[1] N.C. Gen. Stat. § 90-113.52A(d).

1. The reference to quantity limits in section 90-113.52 appears to be a clerical error as that statute includes no quantity limits on sales, but rather specifies other regulations for the sale of pseudoephedrine products, such as age restrictions and a requirement that those products be stored behind the pharmacy counter. *See* N.C. Gen. Stat. § 90-113.52 (2013). However, section 90-113.53, entitled "Pseudoephedrine transaction limits[,]" does specify daily and monthly quantity limits on the delivery and purchase of pseudoephedrine products. *See* N.C. Gen. Stat. § 90-113.53 (2013) (limiting sales to 3.6 grams per calendar day and 9 grams in any 30-day period).

Prior to 1 December 2013, section 90-95, which proscribes violations and penalties under the CSA, made it "unlawful for any person to . . . [p]ossess an immediate precursor chemical *with intent to manufacture a controlled substance* . . . [or to p]ossess or distribute an immediate precursor chemical *knowing, or having reasonable cause to believe, that the immediate precursor chemical will be used to manufacture a controlled substance*." N.C. Gen. Stat. § 90-95(d1)(1)(a)-(b) (2011) (emphasis added). Thus, before 1 December 2013, the purchase and possession of pseudoephedrine products was legal for all citizens, even those with prior methamphetamine convictions, unless the products were possessed with the knowledge or intent that they be used to manufacture methamphetamine. Effective 1 December 2013, section 90-95(d1)(1) was amended to add subsection (c) ("the new subsection"), making it "unlawful for any person to . . . [p]ossess a pseudoephedrine product if the person has a prior conviction for the possession or manufacture of methamphetamine." N.C. Gen. Stat. § 90-95(d1)(1)(c) (2013). Violation of this provision is a Class H felony. *Id.*

On Monday, 7 January 2014, Detective John Hollar of the Watauga County Sheriff's Office ("WCSO") reviewed the weekend's NPLEx logs and saw that Miller, a former methamphetamine offender,[2] had purchased one 3.6 gram box of allergy and congestion relief medicine, a pseudoephedrine product, from the Boone Walmart. As noted *supra*, Miller's purchase and possession of this product in this amount had been entirely lawful up until the new subsection went into effect the previous month. Hollar went to the Walmart to investigate Miller's purchase where he learned that the store's video surveillance system had not been working over the weekend. However, Hollar did obtain a copy of a Walmart receipt that appeared to contain Miller's electronic signature and indicated that Miller purchased a pseudoephedrine product on Saturday afternoon.

On 23 January 2014, Hollar obtained an arrest warrant for Miller which he served on Miller at his probation officer's office the following day. On 4 August 2014, Miller was indicted under the new subsection for possessing a pseudoephedrine product having been previously convicted of methamphetamine possession. On 4 February 2015, Miller filed

2. On 3 October 2012, a judgment was entered upon Miller's conviction on one count each of possession of a methamphetamine precursor and maintaining a vehicle or dwelling for sale or delivery of a controlled substance. The trial court imposed a sentence of 16 to 20 months, suspended the sentence, and placed Miller on 36 months of supervised probation.

a motion to declare the new subsection unconstitutional as applied to him, citing *Lambert v. California*, 355 U.S. 225, 2 L. Ed. 2d 228 (1957).

The matter came on for trial at the 2 February 2015 criminal session of Watauga County Superior Court, the Honorable Eric C. Morgan, Judge presiding. During a pretrial motion hearing, Miller argued that the new subsection is unconstitutional because it lacks any element of scienter or intent and the State failed to provide him any notice of the statute and its implications. In response, the State contended that no intent element was necessary because of the extreme danger to the public posed by methamphetamine labs. The State compared the new subsection to laws prohibiting the possession of a firearm by a convicted felon, which the State contended have been upheld as constitutional despite the lack of any intent element or notice provision. After hearing arguments of counsel, the trial court denied Miller's motion to declare the new subsection unconstitutional, stating:

> All right, in this matter, coming on to be heard, and being heard, on the defendant's motion to declare [section] 90-95(d1)(1)(c) unconstitutional. The [c]ourt having considered the arguments of counsel, having reviewed the authorities cited by counsel together with the pleadings filed in this action, and the [c]ourt having considered the [S]tate's argument of statute, [section] 90-95(d1)(1)(c) is analogous to North Carolina['s] possession of firearm by felon statute found in [section] 14-415.1. And the [c]ourt noting that the possession of firearm by felon statute has been upheld by North Carolina courts as constitutional in the cases of [] *State* [*v.*]*Tanner*, 39 N.C. App. 668; *State* [*v.*] *Cooper*, 364 N.C. 404; and *State* [*v.*] *Coltrane*, 188 N.C. App. 498, among other cases.
>
> Further, the Court having reviewed [section] 90-95(d1)(1)(c), in the exercise of its discretion, denies [sic] to declare N.C. Gen. Stat. [§] 90-95(d1)(1)(c) unconstitutional.

At trial, the State offered testimony, *inter alia*, from Hollar about his investigation, as described *supra*, and from the Walmart pharmacy manager about the system for tracking the sale of pseudoephedrine products. At the close of the State's evidence, Miller moved to dismiss,

> based on the testimony of the witnesses that have been presented by the [S]tate. Chiefly, the pharmacy manager and the lack of knowledge that she presented regarding how this data is entered, how it could, or could not

> be, manipulated by a pharmacy worker, and just, I don't believe that the [S]tate has presented enough evidence that a jury could reasonably find Mr. Miller guilty of this, of the crime as charged. I will also note that there is a defect in the indictment. I will argue that it is a fatal defect.

The trial court denied the motion to dismiss, and Miller offered no evidence. During the charge conference, Miller requested a jury instruction on specific intent, and the court agreed to give North Carolina Pattern Jury Instruction 120.10, informing the jury that intent "must ordinarily be proved by circumstances from which it may be inferred." However, the court did not instruct the jury that the offense with which Miller was charged required the State to prove any *element* of intent. The jury returned a verdict of guilty, and the trial court imposed a sentence of 6 to 17 months, suspended the sentence, and placed Miller on supervised probation for 24 months.

Miller's Petition for Writ of Certiorari

During his sentencing hearing, Miller indicated that he intended to appeal his conviction. The parties then discussed an appeal bond, and the court entered judgment on Miller's conviction. Following the imposition of judgment, the trial court asked Miller if he wanted an appointed attorney for his appeal and he responded in the affirmative. As Miller concedes in his petition for writ of *certiorari*, however, he failed to enter proper notice of appeal following entry of judgment. Rule 4 of the Rules of Appellate Procedure provides that notice of appeal in criminal actions can be taken by "(1) giving oral notice of appeal at trial, or (2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment . . . ." N.C.R. App. P. 4(a). Oral notice of appeal must be given *after* the entry of judgment. *See* N.C. Gen. Stat. § 15A-1444(a) (2015) ("A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right *when final judgment has been entered*." (emphasis added)).

Recognizing his failure to give timely notice of appeal, on 5 June 2015, Miller filed in this Court a petition for writ of *certiorari* asking that we exercise our discretion to address the merits of his argument. *See, e.g.*, *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 ("While this Court cannot hear [a] defendant's direct appeal [for failure to properly give notice of appeal], it does have the discretion to consider the matter by granting a petition for writ of *certiorari*."), *appeal dismissed*, 360 N.C. 73, 622 S.E.2d 626 (2005). On 17 June 2015, the State filed its

response to Miller's petition, acknowledging our discretion to grant the petition. By order entered 24 June 2015, Miller's petition for writ of *certiorari* was referred to this panel. We allow Miller's petition and address the merits of his appellate argument.

Discussion

Miller argues that the new subsection is unconstitutional as applied to him in that it violates the due process clauses of the United States and North Carolina Constitutions. Specifically, Miller contends that the new subsection violates his substantive due process rights by subjecting him to punishment for a serious offense without requiring any evidence of intent and violates his procedural due process rights by punishing him for an act that was legal a month earlier without any notice to him that such conduct was now criminal. We hold that Miller's conviction of the strict liability offense created by the new subsection in the absence of notice violated his rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

I. Standard of review

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted), *appeal dismissed and disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010).

II. Strict liability nature of the offense defined in the new subsection

[1] As part of his argument in the trial court and on appeal, Miller first urges that an intent element should be read into the new subsection despite the absence of explicit language regarding *mens rea*. Because we conclude that this omission was an intentional decision by our General Assembly, we must decline to graft an intent element onto this new offense.

"It is within the power of the Legislature to declare an act criminal irrespective of the intent of the doer of the act. The doing of the act expressly inhibited by the statute constitutes the crime." *State v. Hales*, 256 N.C. 27, 30, 122 S.E.2d 768, 771 (1961) (citations omitted).

> Whether a criminal intent is a necessary element of a statutory offense is a matter of construction to be determined from the language of the statute in view of its manifest purpose and design. As a cardinal principle of statutory interpretation, if the language of the statute is clear and is not ambiguous, we must conclude that the legislature

> intended the statute to be implemented according to the plain meaning of its terms. Thus, in effectuating legislative intent, it is the duty of the courts to give effect to the words actually used in a statute and not to delete words used or to insert words not used.

State v. Watterson, 198 N.C. App. 500, 505, 679 S.E.2d 897, 900 (2009) (citations, internal quotation marks, and brackets omitted). The *Watterson* Court went on to note that, where "the General Assembly specifically included additional intent provisions in [certain] subsections of the statute, we can presume that it did not intend for courts to impose additional intent requirements in the other subsections." *Id.* at 505-06, 679 S.E.2d at 900 (citing *N.C. Dep't of Revenue v. Hudson* 196 N.C. App. 765, 768, 675 S.E.2d 709, 711 (2009) ("When a legislative body includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislative body] acts intentionally and purposely in the disparate inclusion or exclusion.") (citation and internal quotation marks omitted)).

As noted *supra*, the new subsection makes it a felony to "[p]ossess a pseudoephedrine product if the person has a prior conviction for the possession or manufacture of methamphetamine." N.C. Gen. Stat. § 90-95(d1)(1)(c). The plain language of the new subsection does not specify any intent element,[3] and we cannot "insert words not used." *Watterson*, 198 N.C. App. at 505, 679 S.E.2d at 900 (citations omitted). Further, a careful reading of the new subsection in context reveals that our General Assembly specifically included intent elements in each of the other, previously enacted subsections of 90-95(d1):

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3. We recognize that any possession of a controlled substance offense contains an implied *knowledge* element, to wit, that the defendant must know he possesses the controlled substance and must also know the identity of the substance. *See State v. Galaviz-Torres*, 368 N.C. 44, 52, 772 S.E.2d 434, 439 (2015) ("[F]or the defendant to be guilty [of possession of a controlled substance], he had to both knowingly possess a substance and know that the substance that he possessed was the substance that he was charged with possessing.") (discussing *State v. Coleman*, 227 N.C. App. 354, 742 S.E.2d 346, *disc. review denied*, 367 N.C. 271, 752 S.E.2d 466 (2013)). Here, Miller does not dispute that he knew he was buying a pseudoephedrine product. However, the act criminalized by the new subsection is not merely possessing a pseudoephedrine product, an undertaking that is entirely legal for most citizens of our State, but rather possessing a pseudoephedrine product while prohibited by law from doing so on the basis of a past methamphetamine conviction. This is an entirely different situation from possession of controlled substances, which is illegal for *all* citizens. Thus, we reject the State's assertion that the new subsection is "a straightforward criminal statute prohibiting possession of a controlled substance by a person with a prior conviction for the possession or manufacture of methamphetamine."

(1) Except as authorized by this Article, it is unlawful for any person to:

a. Possess an immediate precursor chemical *with intent* to manufacture a controlled substance; or

b. Possess or distribute an immediate precursor chemical *knowing, or having reasonable cause to believe*, that the immediate precursor chemical will be used to manufacture a controlled substance; or

c. Possess a pseudoephedrine product if the person has a prior conviction for the possession or manufacture of methamphetamine.

Any person who violates this subdivision shall be punished as a Class H felon, unless the immediate precursor is one that can be used to manufacture methamphetamine.

(2) Except as authorized by this Article, it is unlawful for any person to:

a. Possess an immediate precursor chemical with intent to manufacture methamphetamine; or

b. Possess or distribute an immediate precursor chemical knowing, or having reasonable cause to believe, that the immediate precursor chemical will be used to manufacture methamphetamine.

Any person who violates this subdivision shall be punished as a Class F felon.

N.C. Gen. Stat. § 90-95(d1) (emphasis added).[4] We must presume that our General Assembly acted "intentionally and purposely in the disparate inclusion or exclusion" of an intent element in each subsection, *see Watterson*, 198 N.C. App. at 506, 679 S.E.2d at 900, and accordingly, we conclude that our legislature intended for the new subsection to be

4. Although not pertinent to this appeal, we note that our General Assembly has since amended the new subsection. Session Law 2014-115, s. 41(a) made a minor stylistic change in subdivision (d1)(1)(c) and rewrote the undesignated paragraph of that subdivision. Session Law 2015-32, s. 1, effective 1 December 2015, *inter alia*, expanded the list of previous convictions in the first sentence of subdivision (d1)(1)(c) to include "possession with the intent to sell or deliver methamphetamine, sell or deliver methamphetamine, trafficking methamphetamine, possession of an immediate precursor chemical" and added a second sentence to the subdivision: "The prior conviction may be from any jurisdiction within the United States."

exactly what its plain language indicates: a strict liability offense without any element of intent.[5]

III. Consideration of the constitutionality of the new subsection

[2] We now turn to Miller's contention that the new subsection is unconstitutional as applied to him insofar as it is a strict liability offense that criminalizes otherwise innocuous and lawful behavior by him without providing him notice that those acts are now crimes. In our consideration of this contention, we emphasize the distinction between *intent to commit a crime*, which, as discussed *supra*, the new subsection does not require, and notice, *i.e.*, the knowledge that one is subject to criminal penalties for a particular act. As discussed herein, we conclude that the absence of any notice to Miller that he was subject to serious criminal penalties for an act legal for most people, most convicted felons, and indeed, for Miller himself only a few weeks previously, renders the new subsection unconstitutional as applied to him.

A. Overview of the role of mens rea and notice to protect due process rights

Under the United States Constitution, it is a "basic principle that a criminal statute must give fair warning of the conduct that it makes a crime . . . ." *Bouie v. City of Columbia*, 378 U.S. 347, 350, 12 L. Ed. 2d 894, 898 (1964) (discussing the due process rights guaranteed by U.S. Const. amend. XIV). In criminal statutes, due process rights are most often protected by the inclusion of a *mens rea* element:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Liparota v. United States, 471 U.S. 419, 425, 85 L. Ed. 2d 434, 440 (1985) (citation and internal quotation marks omitted).

While mindful of the "core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct[,]" *Rogers v. Tennessee*, 532 U.S. 451,

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5. In this regard, we are in full accord with the State, which argued consistently and vigorously both at trial and on appeal that the crime defined in the new subsection does not include any element of intent.

459, 149 L. Ed. 2d 697, 706 (2001) (citation omitted), courts have held constitutional certain strict liability crimes or "public welfare offense[s] which . . . depend on no mental element but consist only of forbidden acts or omissions." *Liparota*, 471 U.S. at 433, 85 L. Ed. 2d at 444 (citation and internal quotation marks omitted). For such offenses, which arise from conduct "a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety[,]" notice that an act may subject one to criminal penalties will be presumed even in the absence of any explicit *mens rea* element. *Id.* at 433, 85 L. Ed. 2d at 444. For example, the United States Supreme Court has held that the government need not prove *mens rea* when prosecuting defendants for possessing "[illegal] drugs, . . . hand grenades, . . . [or] sulfuric and other dangerous acids. . . . [because] the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 564-65, 29 L. Ed. 2d 178, 183 (1971) (discussing *United States v. Freed*, 401 U.S. 601, 609, 28 L. Ed. 2d 356, 362 (1971) (observing that "one would hardly be surprised to learn that possession of hand grenades is not an innocent act") and *United States v. Balint*, 258 U.S. 250, 254, 66 L. Ed. 604, 606 (1922) (holding no *mens rea* is required for convictions for sales of narcotics)). *See also United States v. Dotterweich*, 320 U.S. 277, 284-85, 88 L. Ed. 48, 53 (1943) (upholding conviction for violation of the Food, Drug, and Cosmetic Act for shipping adulterated and misbranded drugs "even though consciousness of wrongdoing be totally wanting").

The public welfare exception is limited, however, to circumstances where notice can reasonably be inferred. As the Court in *Int'l Minerals & Chem. Corp.* noted, like illegal drugs, grenades, and dangerous chemicals, "[p]encils, dental floss, [and] paper clips may also be regulated. But they may be the type of products which might raise substantial due process questions" were their possession criminalized in the absence of a *mens rea* element. 402 U.S. at 564-65, 29 L. Ed. 2d at 183. In *Liparota*, the Court held that a law which "declare[d] it criminal to use, transfer, acquire, alter, or possess food stamps in any manner not authorized by statute or regulations. . . . require[d] a showing that the defendant knew his conduct to be unauthorized by statute or regulations" because the act prohibited would not reasonably be assumed illegal. 471 U.S. at 426, 85 L. Ed. 2d. at 440 (citations omitted). *See also United States v. X-Citement Video*, 513 U.S. 64, 130 L. Ed. 2d 372 (1994) (reversing convictions under the Protection of Children Against Sexual Exploitation Act of 1977, which prohibited knowingly transporting, shipping, receiving, distributing, or reproducing a visual depiction of a minor engaging

in sexually explicit conduct, after holding that the word "knowingly" applied to both the explicit nature of the depiction and to the age of the performers).

Similarly, in *Lambert*, the Court discussed the due process implications of strict liability offenses. 355 U.S. at 228, 2 L. Ed. 2d at 231 (limiting the principle that "ignorance of the law will not excuse") (citation and internal quotation marks omitted). In that case, the Court considered the constitutionality of a provision of the Los Angeles Municipal Code that criminalized the presence in Los Angeles for more than five days of any person convicted of a felony in California unless the person registered with the police. *Id.* at 226-27, 2 L. Ed. 2d at 230. In reversing the appellant's conviction and holding the ordinance unconstitutional, the Court observed that

> circumstances which might move one to inquire as to the necessity of registration are completely lacking. . . . We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand. . . . A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear. *Its severity lies in the absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it.* Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.

Id. at 229-30, 2 L. Ed. 2d at 232 (citation and internal quotation marks omitted; emphasis added).

This Court has observed that

> *Lambert* has been very narrowly construed and that few cases since have been able to successfully argue its application to new facts before the Court. However, we note that each time a court has refused to apply *Lambert*, the defendant at hand *either knew or should have known* of the possible violation.

State v. Young, 140 N.C. App. 1, 12, 535 S.E.2d 380, 386 (2000) (emphasis added) (discussing cases involving: distribution of child pornography, *United States v. Lamb*, 945 F. Supp. 441 (N.D.N.Y. 1996); possession of a firearm by a person subjected to a judicial anti-stalking order or who had committed a crime of domestic violence, *United States v. Meade*, 175 F.3d 215 (1st Cir. 1999); and possession of a firearm by a person against whom a domestic violence protective order has been obtained, *United States v. Bostic*, 168 F.3d 718 (4th Cir. 1999), *cert. denied*, 527 U.S. 1029, 144 L. Ed. 2d 785 (1999)), *disc. review improvidently allowed*, 354 N.C. 213, 552 S.E.2d 142 (2001). This observation is consistent with the United States Supreme Court case law discussed *supra*, to wit, that the requirement of knowledge that an act is prohibited "is particularly appropriate where . . . to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct." *Liparota*, 471 U.S. at 426, 85 L. Ed. 2d. at 440 (holding that a law which "declare[d] it criminal to use, transfer, acquire, alter, or possess food stamps in any manner not authorized by statute or regulations. . . . requires a showing that the defendant *knew his conduct to be unauthorized by statute or regulations*") (citations omitted; emphasis added).

B Appropriateness of requiring knowledge or notice that possessing an over-the-counter medication is prohibited by law for a specific group of felons

We agree with the State that methamphetamine manufacture and use is a significant law enforcement and public health problem which demands serious criminal penalties. However, in light of the precedent established in *Lambert* and *Liparota*, we conclude that the new subsection is unconstitutional as applied to Miller. The new subsection made it a felony for Miller to possess a pseudoephedrine product because he had a previous conviction for possession of methamphetamine. Possession of pseudoephedrine products is an innocuous and entirely legal act for the majority of people in our State, including most convicted felons. Thus, unlike selling illegal drugs, possessing hand grenades or dangerous acids, *see Int'l Minerals & Chem. Corp.*, 402 U.S. at 564-65, 29 L. Ed. 2d at 183, or shipping adulterated prescription drugs, *see Dotterweich*, 320 U.S. at 284, possessing allergy medications containing pseudoephedrine is an act that citizens, including convicted felons, would reasonably assume to be legal. *See Liparota*, 471 U.S. at 426, 85 L. Ed. 2d. at 440.

Further, although we recognize that the sale and purchase of pseudoephedrine products has been regulated for many years under the CSA, *see*, *e.g.*, N.C. Gen. Stat. §§ 90-113.52A(d), 90-113.53, and that the United

States Supreme Court has held that certain offenses which arise from conduct "a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety" can be criminalized even in the absence of notice or an explicit *mens rea* element, *see Liparota*, 471 U.S. at 433, 85 L. Ed. 2d at 444, we conclude that the existence of those very regulations only serves to highlight the violation of Miller's due process rights in the absence of notice to him of the new subsection's provisions. Under those provisions, such as the CSA's quantity limits and record-keeping requirements, before the effective date of the new subsection, anyone wishing to purchase a pseudoephedrine product from a retail store *had notice* of exactly what was permissible and required without violating the laws of our State, namely: (1) requesting the products from behind the pharmacy counter, (2) purchasing only approved quantities of the products, (3) showing the required identification, and (4) having the necessary personal information submitted to the NPLEx system. If, and only if, the purchaser complied with the CSA requirements would he be allowed to purchase a pseudoephedrine product. Before 1 December 2013, it was entirely legal for Miller, like any member of the general public, to purchase pseudoephedrine products in this manner. Before 1 December 2013, it was entirely legal for Miller, despite having been convicted of a methamphetamine offense, to purchase up to "3.6 grams of . . . pseudoephedrine products per calendar day" and up to "9 grams of pseudoephedrine products within any 30-day period." *See* N.C. Gen. Stat. § 90-113.53(a)-(b).

Some five weeks later on 5 January 2014, Miller followed those same procedures in order to purchase a pseudoephedrine product. The Walmart pharmacist who sold him the pseudoephedrine product obtained the product from behind the counter, ensured Miller's purchase did not exceed the quantity limits of the CSA, checked Miller's identification, and submitted the pertinent data to the NPLEx system. No stop sale alert was issued. As a result, the pharmacist believed the sale and purchase were legal, as did Miller. Indeed, for most people, *including the vast majority of convicted felons*, this transaction *would* have been legal. Simply put, there were no "circumstances which might move one to inquire as to" a significant change in the CSA's requirements nor any notice to Miller that the new subsection had transformed an innocent act previously legal for him into a felony. *See Lambert*, 355 U.S. at 229, 2 L. Ed. 2d at 232. As such, the application of the new subsection to Miller violated his due process rights under the Fourteenth Amendment.

Our holding is consistent with the 2012 decision of the Court of Criminal Appeals of Oklahoma in *Wolf v. State of Oklahoma*, 292 P.3d

512 (2012), *cert. denied*, __ U.S. __, 186 L. Ed. 2d 877 (2013),[6] wherein that court held that a state law very similar to the new subsection before us violated the appellant's due process rights.

In 2010, the State of Oklahoma criminalized the possession of pseudoephedrine products pursuant to the Methamphetamine Registry Act of 2010 which

> establishe[d] a registry of persons convicted of various methamphetamine crimes, and applie[d] to all persons convicted after November 1, 2010, and all persons on probation for any specified offense as of that date. Upon conviction, the district court clerk [wa]s required to send the name of the offender to the Oklahoma State Bureau of Narcotics and Dangerous Drugs (OSBNDD), which maintains the registry. A person subject to the registry is prohibited from buying pseudoephedrine. Every pharmacist or other person who sells, manufactures or distributes pseudoephedrine must check the registry at each purchase, and deny the sale to any person on the list.

Wolf, 292 P.3d at 514. However, "the statute d[id] not provide that [district] court clerks notify any convicted person that [her] name ha[d] been submitted to the OSBNDD, or that [she was] subject to the registry" and the attendant criminal penalties for possessing pseudoephedrine. *Id.* at 515. The appellant in *Wolf*, a former methamphetamine offender who had been convicted of possessing pseudoephedrine while unknowingly subject to the registry, argued that, "[i]n order to be constitutional, the offense of unlawfully purchasing pseudo[e]phedrine while subject to the methamphetamine registry act must be construed as having a *mens rea* component . . . ." *Id.* at 514 (italics added). The state of Oklahoma, in contrast, asserted that the new law was constitutional as "a strict liability crime . . . [with] no legal requirement that a person know she has violated the statute or is subject to criminal penalties . . . ." *Id.*

The Oklahoma court agreed that strict liability offenses could be constitutional, but explained that,

> *when otherwise lawful conduct is criminalized, the criminal statute must provide sufficient notice for a person to know she is committing a crime.* . . . There

6. Although not binding on this Court, we find the reasoning of our sister court highly persuasive.

> is a distinction between knowledge that one is subject to criminal penalties, and intent to commit a crime. A strict liability crime does not require any intent to commit a crime. However, due process requires notice that specific conduct is considered a criminal offense.

Id. (emphasis added). The Oklahoma court then held the statute unconstitutional, reasoning that,

> [t]aken together, *Lambert* and *Liparota* suggest that, while a legislature may criminalize conduct in itself, with no intent requirement, the legislature must make some provision to inform a person that the conduct, as applied to her, is criminal. This is particularly important where the conduct in question is otherwise legal. This is precisely the circumstance here: some convicted felons are prohibited from purchasing pseudoephedrine, while others, along with the general population, are not.

Id. at 516.

We fully agree. The new subsection is unconstitutional as applied to a defendant in the absence of notice to the subset of convicted felons whose otherwise lawful conduct is criminalized thereby or proof beyond a reasonable doubt by the State that a particular defendant was aware that his possession of a pseudoephedrine product was prohibited by law.

C. Distinctions and analogies to provisions in the Felony Firearms Act

Before this Court, as in the trial court, the State analogizes the new subsection to our State's laws criminalizing possession of a firearm by a felon, observing that the various incarnations of those statutes have been upheld as constitutional despite the absence of any intent element or notice provision. Specifically, the State cites *State v. Tanner*, 39 N.C. App. 668, 251 S.E.2d 705, *disc. review denied and appeal dismissed*, 297 N.C. 303, 254 S.E.2d 924 (1979); *State v. Coltrane*, 188 N.C. App. 498, 656 S.E.2d 322 (2008), *disc. review denied and appeal dismissed*, 362 N.C. 476, 666 S.E.2d 760 (2008); and S*tate v. Whitaker*, 364 N.C. 404, 700 S.E.2d 215 (2010). Our review, however, reveals that these cases are inapposite to Miller's arguments regarding notice and intent.

Our State's statutes regulating the right of convicted felons to possess firearms have undergone numerous changes since their original enactment.

> In 1971, the General Assembly enacted the Felony Firearms Act, N.C. Gen. Stat. § 14-415.1, which made unlawful the possession of a firearm by any person previously convicted of a crime punishable by imprisonment of more than two years. [Section] 14-415.2 set forth an exemption for felons whose civil rights had been restored.
>
> In 1975, the General Assembly repealed [section] 14-415.2 and amended [section] 14-415.1 to ban the possession of firearms by persons convicted of certain crimes for five years after the date of such conviction, or unconditional discharge from a correctional institution, or termination of a suspended sentence, probation, or parole upon such convictions, whichever is later. . . .

State v. Johnson, 169 N.C. App. 301, 303, 610 S.E.2d 739, 741 (citations and internal quotation marks omitted), *disc. review denied and appeal dismissed*, 359 N.C. 855, 619 S.E.2d 855 (2005). In *Tanner*, we rejected the defendant's arguments that the amended statute was unconstitutionally vague and that the statute's

> classifications [were] unconstitutional [because]: (1) it denie[ed] the right to possess firearms to those convicted of certain felonies but not all felonies; (2) it allow[ed] the right of possession to some felons in the prohibited class due to the length of their sentences, probation and parole; and (3) it allow[ed] a convicted felon to possess a firearm in his home or place of business but [did] not provide a way for him to get the firearm there.

39 N.C. App. at 670, 251 S.E.2d at 706. The defendant did not make, and thus this Court did not address, any arguments regarding intent or notice.

"In 1995, the General Assembly amended N.C. Gen. Stat. § 14-415.1 to prohibit possession of certain firearms by *all* persons convicted of any felony." *Johnson*, 169 N.C. App. at 303, 610 S.E.2d at 741 (citation omitted; emphasis in original). Then, "in 2004 the General Assembly amended [section] 14-415.1 to extend the prohibition on possession to *all* firearms by any person convicted of any felony, even within the convicted felon's own home and place of business." *Britt v. State*, 363 N.C. 546, 548, 681 S.E.2d 320, 321 (2009) (citation omitted; emphasis in original). This Court rejected a double jeopardy argument in *Coltrane*, 188 N.C. App. at 504-05, 656 S.E.2d at 327, and, in *Whitaker*, our Supreme

Court held that the statute as amended in 2004 was "not an impermissible *ex post facto* law or bill of attainder." 364 N.C. at 405, 700 S.E.2d at 216 (italics added). Again, in neither case did the appellant present or the appellate court consider an argument regarding the due process implications of the lack of an intent element or notice provision in the statute in question.

The statute was further amended in 2006, 2010, and 2011,[7] and the current version provides:

> (a) It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction as defined in [section] 14-288.8(c). For the purposes of this section, a firearm is (i) any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive, or its frame or receiver, or (ii) any firearm muffler or firearm silencer. This section does not apply to an antique firearm, as defined in [section] 14-409.11.
>
> Every person violating the provisions of this section shall be punished as a Class G felon.
>
> (b) Prior convictions which cause disentitlement under this section shall only include:
>
> > (1) Felony convictions in North Carolina that occur before, on, or after December 1, 1995; and
> >
> > (2) Repealed by Session Laws 1995, c. 487, s. 3, effective December 1, 1995.
> >
> > (3) Violations of criminal laws of other states or of the United States that occur before, on, or after December 1, 1995, and that are substantially similar

7. In 2006, subsection (a) was amended to exempt antique firearms from the law. *See* 2006 N.C. Sess. Laws 259, s. 7(b). Session Laws 2010-108, s. 3, as amended by Session Laws 2011-2, s.1 added subsections (d) and (e). Session Laws 2011-268, s. 13, *inter alia*, rewrote subsection (d), which formerly read: "This section does not apply to a person whose firearms rights have been restored under [section] 14-415.4, unless the person is convicted of a subsequent felony after the petition to restore the person's firearms rights is granted." Other amendments made in 2010 and 2011 relate to communication with federal law enforcement agencies and to the applicability of amended provisions to offenses committed on or after specific dates.

> to the crimes covered in subdivision (1) which are punishable where committed by imprisonment for a term exceeding one year.
>
> . . . . [Provisions regarding use of records of prior convictions to prove a violation of this section]
>
> (c) . . . . [Provisions regarding requirements for the indictment charging a violation of this section]
>
> (d) This section does not apply to a person who, pursuant to the law of the jurisdiction in which the conviction occurred, has been pardoned or has had his or her firearms rights restored if such restoration of rights could also be granted under North Carolina law.
>
> (e) This section does not apply and there is no disentitlement under this section if the felony conviction is a violation under the laws of North Carolina, another state, or the United States that pertains to antitrust violations, unfair trade practices, or restraints of trade.

N.C. Gen. Stat. § 14-415.1 (2015). As with previous versions of the law, no defendant has brought forward a constitutional challenge to the present version of section 14-415.1 on grounds of lack of notice under the precedent of *Lambert* and *Liparota*. We find it relevant, however, that in holding the 2004 amendment to section 14-415.1 was unconstitutional as applied to the defendant in *Britt*, our Supreme Court discussed five factors, including, *inter alia*, the defendant's "assiduous and proactive compliance with the 2004 amendment[,]" emphasizing the defendant's knowledge that the statute had changed so as to criminalize his previoulys lawful conduct. 363 N.C. at 550, 681 S.E.2d at 323 (analyzing the statute under Article I, Section 30 of the North Carolina Constitution: "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.").

For the reasons discussed *supra*, we conclude that the distinctions between the new subsection of the CSA and the provisions of the Felony Firearms Act are significant. Moreover, we find them dispositive in defeating any reliance on using our case law regarding the latter in determining the constitutionality of the former. As previously noted, the act of buying a pseudoephedrine product is innocent and legal for the general public, and, unlike possession of a firearm, legal for most convicted felons. Miller's purchase of a pseudoephedrine product after complying with the other regulations of the CSA had been legal five

weeks before the act which resulted in his felony conviction, and, having complied as usual with those regulations, no stop sale alert was issued by the NPLEx system, such that both Miller and the pharmacist selling him the product believed his purchase was legal.

Conclusion

While our General Assembly is free to "criminalize conduct in itself, with no intent requirement, the legislature must make some provision to inform a person that the conduct, as applied to h[im], is criminal[,] . . . particularly . . . where the conduct in question is otherwise legal." *See Wolf*, 292 P.3d at 516. We leave it to the other branches of government to determine the best manner in which to do so, whether by individually contacting the special subset of felons to whom the new subsection applies, requiring that signs regarding the provisions of the new subsection be posted at pharmacy counters, adding an informational statement to the NPLEx system, or some other method. However, as applied to Miller, the new subsection is unconstitutional because it failed to afford him sufficient notice and fair warning as required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, that his previously legal conduct had been criminalized. Accordingly, the trial court's judgment entered upon Miller's conviction is

VACATED.

Chief Judge McGEE and Judge HUNTER, JR. concur.

STATE OF NORTH CAROLINA
v.
CHARLES MORRIS, DEFENDANT

No. COA15-846

Filed 15 March 2016

Satellite Based Monitoring—viewed as search—reasonableness—totality of the circumstances

The trial court's order that defendant be subject to lifetime satellite monitoring (SBM) was reversed and remanded for a new hearing for the trial court to determine whether SBM was reasonable, based on the totality of the circumstances, as mandated by the Supreme Court of the United States in *Grady v. North Carolina*, 575 U.S. ___ (2015).

Appeal by defendant from Order entered 6 April 2015 by Judge C. Winston Gilchrist in Harnett County Superior Court. Heard in the Court of Appeals 13 January 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph Finarelli, for the State.

Meghan Adelle Jones for defendant.

ELMORE, Judge.

Charles Morris (defendant) appeals from the trial court's order requiring him to enroll in Satellite-Based Monitoring (SBM) and to register as a sex offender for his natural life. After careful review, we reverse and remand.

I. Background

On 27 June 2007, defendant waived a bill of indictment and agreed that one count of first-degree sex offense and three counts of indecent liberties with a child could be tried upon information. That same day, defendant pleaded guilty to three counts of indecent liberties with a child, and the trial court sentenced him to three periods of confinement to be served consecutively: twenty to twenty-four months, twenty to twenty-four months, and seventeen to twenty-one months.

After defendant completed his sentence, the Harnett County Superior Court held a Determination Hearing on 6 April 2015 to decide

if defendant shall register as a sex offender and enroll in SBM for his natural life. During the hearing, the following colloquy took place:

> MS. GROH: And your Honor, that's correct. I would agree that, as the statute reads now, those do fit under as him being a recidivist although, your Honor, my argument is going to be the same as Mr. Jones[1] in that I would argue that is [sic] unreasonable search and seizure. I would like that—knowing what you will do, I would just like that objection noted for the record, your Honor.
>
> THE COURT: Okay.
>
> MS. GROH: Or that argument, for the record.
>
> THE COURT: Anything else that you want to offer?
>
> MS. GROH: No, your Honor.
>
> THE COURT: Anything else the State wants to offer?
>
> MR. BAILEY: No, your Honor.
>
> . . . .
>
> THE COURT: All right. The Court has considered the case of *Grady v. North Carolina*. Court evaluates the issue of satellite-based monitoring, recognizing that such monitoring constitutes a search or seizure under the 4th Amendment of the United States constitution and under equivalent provisions of North Carolina constitution. Court finds the defendant has previously been convicted of a second-degree sex offense, is that right, Mr. Bailey?
>
> MR. BAILEY: That's correct.
>
> THE COURT: Court finds defendant has been so convicted, and the current conviction, the most recent conviction for the defendant is for indecent liberties, also a sexually violent offense. Court finds the defendant is a recidivist under the North Carolina statutes. That lifetime registration is required. Such registration and lifetime satellite-based

1. Mr. Jones represented the defendant in *State v. Blue*, ___ N.C. App. ___, ___ S.E.2d ___ (No. COA 15-837) (2016) in a SBM hearing in front of Judge Gilchrist immediately before defendant's hearing. In *Blue*, the trial court concluded that "lifetime satellite-based monitoring is reasonable and necessary and required by the statute." *Id.*

> monitoring constitutes a reasonable search or seizure of the person, and both lifetime registration and lifetime satellite-based monitoring. Defendant's objections and exceptions previously stated are noted for the record and overruled. State requesting any further findings?
>
> MR. BAILEY: No, sir.

The Honorable C. Winston Gilchrist ordered defendant to register as a sex offender and enroll in SBM for the remainder of his natural life. Defendant gave oral notice of appeal, filed written notice of appeal on 16 June 2015, and filed a petition for writ of *certiorari*, which we granted on 30 December 2015.

II. Analysis

In *Grady v. North Carolina*, 575 U.S. ___, 191 L. Ed. 2d 459 (2015), the Supreme Court of the United States held that North Carolina's SBM program "effects a Fourth Amendment Search." It stated, "That conclusion, however, does not decide the ultimate question of the program's constitutionality. The Fourth Amendment prohibits only unreasonable searches. The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Id.* at ___, 191 L. Ed. 2d at ___. Ultimately, the case was remanded to the New Hanover County Superior Court to determine if, based on the above framework, the SBM program is reasonable.

Like the defendant in *State v. Blue*, ___ N.C. App. ___, ___ S.E.2d ___ (No. COA 15-837) (2016), defendant argues that "the trial court erred in concluding that continuous [SBM] is reasonable and a constitutional search under the Fourth Amendment in the absence of any evidence from the State as to reasonableness." The State argues that it did not bear the burden of proving the reasonableness of the search imposed by SBM, and defendant failed to satisfy his burden of establishing that the search is unreasonable. The State, however, concedes the following:

> If this Court concludes that the State bears the burden of proving the reasonableness of the search imposed by satellite-based monitoring, the State agrees with Defendant that the trial court erred by failing to conduct the appropriate analysis. As a result, this case should be remanded for a new hearing where the trial court will be able to take testimony and documentary evidence addressing

> the "totality of the circumstances" vital in an analysis of the reasonableness of a warrantless search[.]

The trial court erred as it did not analyze the "totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady*, 575 U.S. at ___, 191 L. Ed. 2d at ___. Rather, the trial court simply "considered the case of *Grady v. North Carolina*," and summarily concluded that "registration and lifetime [SBM] constitutes a reasonable search or seizure of the person" and is required by statute.

The trial court failed to follow the mandate of the Supreme Court of the United States and determine, based on the totality of the circumstances, if the SBM program is reasonable when properly viewed as a search. *Grady*, 575 U.S. at ___, 191 L. Ed. 2d at ___; *see Samson v. California*, 547 U.S. 843, 848, 165 L. Ed. 2d 250, 256 (2006) ("Whether a search is reasonable is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.") (internal quotations and citations omitted); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53, 132 L. Ed. 2d 564, 574 (1995). On remand, the State shall bear the burden of proving that the SBM program is reasonable. *State v. Blue*, ___ N.C. App. ___, ___ S.E.2d ___ (No. COA 15-837) (2016).

III. Conclusion

We reverse the trial court's order and remand for a new hearing in which the trial court shall determine if SBM is reasonable, based on the totality of the circumstances, as mandated by the Supreme Court of the United States in *Grady v. North Carolina*, 575 U.S. ___, 191 L. Ed. 2d 459 (2015).

REVERSED AND REMANDED.

Judges STROUD and DIETZ concur.

STATE OF NORTH CAROLINA
v.
KIM SYDNOR, DEFENDANT

No. COA15-776

Filed 15 March 2016

1. Sentencing—habitual felon—jurisdiction

The trial court had jurisdiction to sentence defendant as a habitual felon where defendant's prior conviction for felony assault inflicting serious bodily injury was alleged as a predicate offense to support the indictment charging him with habitual misdemeanor assault. The use of the same offense to establish defendant's status as a habitual felon did not render the indictment defective.

2. Sentencing—prior record level—multiple use of assault conviction

Where an assault conviction was used to support a habitual misdemeanor assault conviction and to establish defendant's status as a habitual felon, it could not also be used to determine defendant's prior record level at sentencing.

3. Sentencing—restitution—insufficient evidence

An award of restitution must be supported by evidence adduced at trial or by reasoning. Here, the award of $5,000 was vacated and remanded for a new hearing because the evidence established only that the victim's medical bills were in excess of $5,000.

Appeal by defendant from judgment entered 19 November 2014 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 16 December 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Kathryn J. Thomas, for the State.

WARD, SMITH & NORRIS, P.A., by Kirby H. Smith, III, for defendant.

ELMORE, Judge.

Kim Sydnor (defendant) was found guilty of assault on a female, habitual misdemeanor assault, and attaining the status of an habitual

felon. The trial court sentenced defendant to a term of 88 to 118 months imprisonment and ordered him to pay $5,000.00 in restitution. After review, we vacate defendant's sentence and the trial court's award of restitution, and we remand for resentencing and a new hearing on restitution.

I. Background

On 22 March 2014, Wake County sheriff's deputies were called to the home of Willie Brown where they found Joynita Sydnor with injuries to her face. Ms. Sydnor told the deputies that she and her husband, defendant, had gotten into an argument when defendant hit her in the face. The deputies interviewed Mr. Brown and another witness at the scene, Nellie Jernigan, who corroborated Ms. Sydnor's statement. After speaking with the deputies, Ms. Sydnor was transported to WakeMed Hospital in Raleigh and treated for her injuries. A warrant for defendant's arrest was issued thereafter.

On 24 June 2014, the Wake County Grand Jury returned a four-count indictment against defendant. Counts one and three charged defendant with the principal misdemeanor offenses of assault on a female and simple assault, respectively, and counts two and four charged defendant with habitual misdemeanor assault. Each count of habitual misdemeanor assault alleged that defendant had previously been convicted of two assault offenses: (1) misdemeanor assault on a female on 14 August 2000, and (2) felony assault inflicting serious bodily injury on 30 May 2007. Defendant was charged in a separate indictment for attaining the status of an habitual felon based on three prior felony convictions: (1) sale of counterfeit controlled substances on 10 August 2000; (2) possession of cocaine on 14 March 2003; and (3) assault inflicting serious bodily injury on 30 May 2007.

The case came to trial on 17 November 2014 in Wake County Superior Court. The jury found defendant guilty of assault on a female, and not guilty of simple assault. Defendant stipulated that his two prior assault convictions, as alleged in the principal indictment, rendered him eligible to be prosecuted for habitual misdemeanor assault. Defendant also pleaded guilty to habitual felon status based on the three prior felony convictions alleged in the habitual felon indictment.

At sentencing, the trial court calculated thirteen prior record points, resulting in a prior record level IV. The court sentenced defendant as an habitual felon, elevating the habitual misdemeanor assault conviction from a Class H to a Class D felony, and imposed an active sentence of 88 to 118 months imprisonment with credit for 236 days served. The trial

court also ordered defendant to pay $5,000.00 in restitution to WakeMed for Ms. Sydnor's unpaid medical bills. Defendant timely appeals.

II. Discussion

A. Habitual Felon Status

[1] Defendant first argues that the habitual felon indictment against him was fatally defective because the State used the same conviction, felony assault inflicting serious bodily injury, to support habitual felon status and to enhance the assault on a female charge to habitual misdemeanor assault. Defendant contends, therefore, that the trial court had no jurisdiction to sentence him as an habitual felon.

"[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). This Court "review[s] the sufficiency of an indictment *de novo*." *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2012).

Pursuant to North Carolina's Habitual Felon Act, "[a]ny person who has been convicted of or pled guilty to three felony offenses . . . is declared to be an habitual felon and may be charged as a status offender pursuant to this Article." N.C. Gen. Stat. § 14-7.1 (2015). To put the defendant on notice "that he is being prosecuted for some substantive felony as a recidivist," *State v. Allen*, 292 N.C. 431, 436, 233 S.E.2d 585, 588 (1977), the principal felony and habitual felon status must be charged in separate indictments, N.C. Gen. Stat. § 14-7.3 (2015). The habitual felon indictment must include "the three prior felony convictions relied on by the State . . . ." *State v. Cheek*, 339 N.C. 725, 729, 453 S.E.2d 862, 865 (1995); *see also* N.C. Gen. Stat. § 14-7.3 (2015) (setting forth the requirements for a valid habitual felon indictment). Upon conviction of the principal felony and, subsequently, attaining habitual felon status, the defendant "must . . . be sentenced and punished as an habitual felon . . . ." N.C. Gen. Stat. § 14-7.2 (2015). Habitual felon status "is not a crime in and of itself," *State v. Kirkpatrick*, 345 N.C. 451, 454, 480 S.E.2d 400, 402 (1997), but a "status justifying an increased punishment for the principal felony." *State v. Priddy*, 115 N.C. App. 547, 549, 445 S.E.2d 610, 612 (1994) (citation omitted).

North Carolina's habitual misdemeanor assault statute, which is partly recidivist in nature, provides as follows:

> A person commits the offense of habitual misdemeanor assault if that person violates any of the provisions of G.S. 14-33 and causes physical injury, or G.S. 14-34, and has two or more prior convictions for either misdemeanor or felony assault . . . . A person convicted of violating this section is guilty of a Class H felony.

N.C. Gen. Stat. § 14-33.2 (2015). Unlike habitual felon status, "habitual misdemeanor assault 'is a substantive offense *and* a punishment enhancement (or recidivist, or repeat-offender) offense.' " *State v. Carpenter*, 155 N.C. App. 35, 49, 573 S.E.2d 668, 677 (2002) (quoting *State v. Vardiman*, 146 N.C. App. 381, 385, 552 S.E.2d 697, 700 (2001), *cert. denied*, 537 U.S. 833, 154 L. Ed. 2d 51 (2002)). The statute treats the defendant's prior assault convictions as elements of habitual misdemeanor assault. It does not, however, " 'impose punishment for [these] previous crimes,' " but instead " 'imposes an enhanced punishment' for the latest offense." *Vardiman*, 146 N.C. App. at 385, 552 S.E.2d at 700 (quoting *State v. Smith*, 139 N.C. App. 209, 214, 533 S.E.2d 518, 521 (2000)); *see also Carpenter*, 155 N.C. App. at 48, 573 S.E.2d at 676–77 (citing prior decisions that note similarities between habitual misdemeanor assault statute and habitual impaired driving statute).

Although the habitual felon statute and the habitual misdemeanor assault statute have both survived constitutional challenges based on double jeopardy, *see State v. Todd*, 313 N.C. 110, 117–18, 326 S.E.2d 249, 253 (1985) (holding habitual felon statute constitutional); *Carpenter*, 155 N.C. App. at 50, 573 S.E.2d at 678 (holding habitual misdemeanor assault statute constitutional), our decisions have recognized limitations on using the same prior convictions to support an habitual offense and to increase a defendant's prior record level at sentencing.

A prior conviction used to establish habitual felon status, for example, may not also be used to determine a defendant's prior record level at sentencing. N.C. Gen. Stat. § 14-7.6 (2015); *State v. Wells*, 196 N.C. App. 498, 502–03, 675 S.E.2d 85, 88 (2009); *State v. Miller*, 168 N.C. App. 572, 575–76, 608 S.E.2d 565, 567 (2005); *State v. Lee*, 150 N.C. App. 701, 703–04, 564 S.E.2d 597, 598–99 (2002); *State v. Bethea*, 122 N.C. App. 623, 626, 471 S.E.2d 430, 432 (1996). As we explained in *State v. Bethea*,

> there are two independent avenues by which a defendant's sentence may be increased based on the existence of prior convictions. A defendant's prior convictions will either serve to establish a defendant's status as an habitual felon pursuant to G.S. 14-7.1 or to increase a defendant's

> prior record level pursuant to G.S. 15A-1340.14(b)(1)–(5). G.S 14-7.6 establishes clearly, however, that the existence of prior convictions may not be used to increase a defendant's sentence pursuant to both provisions at the same time.

Bethea, 122 N.C. App. at 626, 471 S.E.2d at 432.

Likewise, a prior conviction used to support the offense of habitual impaired driving may not also be used to increase a defendant's prior record level. *State v. Gentry*, 135 N.C. App. 107, 111, 519 S.E.2d 68, 70–71 (1999) ("We believe it is reasonable to conclude that that same legislature did not intend that the convictions which elevate a misdemeanor driving while impaired conviction to the status of the felony of habitual driving while impaired, would then again be used to increase the sentencing level of the defendant.").

In addition, a conviction for habitual misdemeanor assault may "not be used as a prior conviction for any other habitual offense statute." N.C. Gen. Stat. § 14-33.2; *State v. Shaw*, 224 N.C. App. 209, 212, 737 S.E.2d 596, 598 (2012) ("A prior habitual misdemeanor assault conviction may not . . . be utilized as a predicate felony for the purpose of establishing that a convicted defendant has attained habitual felon status."). *Cf. State v. Holloway*, 216 N.C. App. 412, 414–15, 720 S.E.2d 412, 413–14 (2011) (holding that a defendant convicted of the principal felony of habitual misdemeanor assault may be sentenced as an habitual felon).

This Court has held, however, that the same prior conviction may be used to support an habitual misdemeanor offense and habitual felon status. In *State v. Misenheimer*, 123 N.C. App. 156, 157, 472 S.E.2d 191, 192, *cert. denied*, 344 N.C. 441, 476 S.E.2d 128 (1996), the defendant was indicted for felony habitual impaired driving and for attaining habitual felon status. The defendant argued that two of his prior convictions could not be used simultaneously to support the habitual impaired driving conviction and to enhance his sentence as an habitual felon. *Id.* We first noted that, pursuant to N.C. Gen. Stat. § 14-7.6, a court may not enhance a defendant's felony level to Class C "on the grounds he is an habitual felon" and also place a defendant "in a higher presumptive range because of his prior record level, when the increased presumptive range is based upon the same convictions which make him an habitual felon." *Id.* at 157–58, 472 S.E.2d at 192. We concluded, however, that there was no similar statutory prohibition against using the defendant's prior convictions as elements of habitual impaired driving and to establish his status as an habitual felon. *Id.* at 158, 472 S.E.2d at 192–93.

We reaffirmed our holding from *Misenheimer* in *State v. Glasco*, 160 N.C. App. 150, 585 S.E.2d 257 (2003). In *Glasco*, the defendant argued that his constitutional protection against double jeopardy was violated because "the court used the offense of possession with intent to sell and deliver cocaine to support both the underlying substantive felony (the 'felon' portion of the offense of felon in possession of a firearm) and the habitual felon indictment." *Id.* at 160, 585 S.E.2d at 264. We rejected this argument, explaining that "[o]ur courts have determined that elements used to establish an underlying conviction may also be used to establish a defendant's status as a habitual felon." *Id.* (citing *Misenheimer*, 123 N.C. App. at 158, 472 S.E.2d at 192–93).

Applying our decisions from *Misenheimer* and *Glasco* to the case *sub judice*, we conclude that the trial court had jurisdiction to sentence defendant as an habitual felon. Defendant's prior conviction for felony assault inflicting serious bodily injury was alleged as a predicate offense to support the indictment charging him with habitual misdemeanor assault. That the same offense, felony assault inflicting serious bodily injury, was also used as a predicate felony to establish defendant's status as an habitual felon does not render the indictment defective.

[2] The trial court did err, however, in calculating defendant's prior record level. In Section I of the sentencing worksheet, the court assigned four points for a single "Prior Felony Class E or F or G Conviction." The only Class E, F, or G felony conviction listed in Section V of the worksheet was defendant's 30 May 2007 conviction for "Assault Inflicting Serious Bodily Injury." Because that same offense was used to support the habitual misdemeanor assault conviction and establish defendant's status as an habitual felon, it could not also be used to determine defendant's prior record level at sentencing. N.C. Gen. Stat. § 14-7.6; *Gentry*, 135 N.C. App. at 111, 519 S.E.2d at 70–71. Had the conviction been properly excluded, defendant would have been sentenced at a prior record level III instead of IV. Accordingly, we vacate defendant's sentence and remand for resentencing.

B. Restitution

[3] Defendant next argues that the trial court erred in ordering defendant to pay $5,000.00 in restitution because the amount of the award was not supported by competent evidence.

A trial court's entry of an award of restitution is deemed preserved for appellate review under N.C. Gen. Stat. § 15A-1446(d)(18) even without a specific objection. *State v. Mumford*, 364 N.C. 394, 403, 699 S.E.2d

911, 917 (2010); *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004) (citing *State v. Reynolds*, 161 N.C. App. 144, 149, 587 S.E.2d 456, 460 (2003)).

"[T]he amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing." *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995) (citing *State v. Daye*, 78 N.C. App. 753, 756, 338 S.E.2d 557, 560, *aff'd per curiam*, 318 N.C. 502, 349 S.E.2d 576 (1986)); *see also* N.C. Gen. Stat. § 15A-1340.36(a) (2015) ("The amount of restitution must be limited to that supported by the record . . . ."). Where "there is some evidence as to the appropriate amount of restitution," the award will not be disturbed on appeal. *State v. Hunt*, 80 N.C. App. 190, 195, 341 S.E.2d 350, 354 (1986). Our North Carolina Supreme Court has explained that

> [i]n applying this standard our appellate courts have consistently engaged in fact-specific inquiries rather than applying a bright-line rule. Prior case law reveals two general approaches: (1) when there is no evidence, documentary or testimonial, to support the award, the award will be vacated, and (2) when there is specific testimony or documentation to support the award, the award will not be disturbed.

State v. Moore, 365 N.C. 283, 285, 715 S.E.2d 847, 849 (2011).

Moore, however, was one of those cases which, "like many others, [fell] in between" the two approaches outlined above. *Id.* In *Moore*, the trial court ordered the defendant to pay an aggrieved property owner $39,332.49 in restitution based on the owner's testimony that estimated repairs to her property "totaled 'thirty-something thousand dollars.' " *Id.* Our Supreme Court rejected the State's argument that the testimony was sufficient to support an award "anywhere between $30,000.01 and $39,999.99." *Id.* at 285–86, 715 S.E.2d at 849. The Court held that "there was 'some evidence' to support an award of restitution; however, the evidence was not specific enough to support the award of $39,332.49." *Id.*

Like the victim's testimony in *Moore*, here Ms. Syndor's testimony provides "some evidence" to support a restitution award but is too vague to support the award of $5,000.00. The only evidence of the cost of Ms. Sydnor's medical treatment was her own testimony that her medical bills were "over $5,000," but she was "not sure" whether they were more than $6,000.00. Contrary to the State's position, her testimony establishes only that her medical bills were in excess of $5,000.00. To hold that this

evidence is sufficient to support the $5,000.00 award would be to hold any award more than $5,000.00 sufficient, as well. Therefore, we vacate the award and remand to the trial court for a new hearing to determine the amount of Ms. Sydnor's WakeMed hospital bills, and to calculate an amount of restitution supported by the evidence. *See Moore*, 365 N.C. at 286, 715 S.E.2d at 849–50 (remanding "to determine the amount of damage proximately caused by defendant's conduct and to calculate the correct amount of restitution").

III. Conclusion

Although defendant's prior offense of assault inflicting serious bodily injury may be used to support convictions of habitual misdemeanor assault and habitual felon status, it may not also be used to determine defendant's prior record level. In addition, our review of the record shows that Ms. Sydnor's testimony was too vague to support the award of restitution. We vacate defendant's sentence and the trial court's award of restitution, and we remand for resentencing and a new hearing on restitution.

VACATED IN PART AND REMANDED.

Judges CALABRIA and ZACHARY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 MARCH 2016)

ARMSTRONG v. PENTZ No. 15-216	Alamance (09CVD2886)	Affirmed
BLAKE v. HARRIS No. 15-736	Guilford (14CVS5002)	Affirmed
DWC3, INC. v. KISSEL No. 15-252	Iredell (14CVS262)	Affirmed
FLETCHER v. BD. OF L. EXAM'RS OF STATE OF N.C. No. 15-861	Wake (13CVS11815)	Affirmed
FOREMOST INS. CO. OF GRAND RAPIDS MICH. v. RAINES No. 15-978	Buncombe (14CVS3397)	Affirmed
FREEMAN v. SONA BLW No. 15-1015	Johnston (13CVS3601)	Affirmed
IN RE C.W.S. No. 15-1029	Watauga (13JT43) (14JT11)	Affirmed
IN RE D.B. No. 15-785	Orange (10JB32)	Affirmed
IN RE DAVIS No. 15-882	N.C. Industrial Commission (U00248)	Affirmed in part; dismissed in part
IN RE MAYE No. 15-874	N.C. Industrial Commission (U00529)	Affirmed in part; dismissed in part.
IN RE STAGGERS No. 15-883	N.C. Industrial Commission (U00421)	Affirmed in part; dismissed in part
IN RE A.L. No. 15-529	Chatham (13JB12)	Affirmed
IN RE J.I. No. 15-516	Halifax (14JB75)	Reversed and remanded
KING v. GIANNINI-KING No. 15-835	Person (08CVD556)	Affirmed in part, dismissed in part

MEYER v. CITIMORTGAGE, INC. No. 15-1046	Union (15CVS232)	Dismissed
MEYER v. FARGO CATTLE CO., INC. No. 15-395	Wake (11CVS1515)	Affirmed
STATE v. ALLEN No. 15-489	Union (12CRS52763-64)	No Error
STATE v. CANNON No. 15-292	Cleveland (12CRS1374-75)	No Prejudicial Error
STATE v. CARTER No. 15-629	Watauga (07CVS198)	Affirmed in Part, Dismissed in Part.
STATE v. CONLEY No. 15-798	Burke (13CRS1728)	Dismissed in part; remanded for resentencing
STATE v. DANIEL No. 15-1085	Pender (12CR851)	Reversed
STATE v. DAVIS No. 15-1138	Union (15CRS166)	Vacated and Remanded
STATE v. FURR No. 15-1184	Cabarrus (14CRS53466)	Affirmed
STATE v. HERRING No. 15-992	Wayne (14CRS51915) (14CRS51918)	Affirmed
STATE v. INGRAM No. 15-794	Forsyth (14CR54171) (14CR54172)	Affirmed
STATE v. KOONCE No. 15-916	Beaufort (10CRS51659) (11CRS82)	No Error
STATE v. MAYE No. 15-676	Union (10CRS53635)	No Error
STATE v. MONTGOMERY No. 15-1000	Cleveland (14CRS51645)	No Error
STATE v. MOORE No. 15-687	Henderson (12CRS54422)	No Error

STATE v. NUNLEY No. 15-840	Randolph (13CRS54177)	No Error
STATE v. PRICE No. 15-1073	Ashe (14CRS51001-02)	No error in part, dismissed in part
STATE v. RHONE No. 15-865	Cumberland (13CRS65359)	No Error
STATE v. SMITH No. 15-921	Cleveland (14CRS522)	No Prejudicial Error
STATE v. SPRINKLE No. 15-657	Iredell (14CRS323-324)	No Error
STATE v. STANLEY No. 15-906	Forsyth (13CRS57159) (13CRS6535) (14CRS55404-05)	Affirmed in part; dismissed in part
STATE v. THOMAS No. 15-936	Iredell (11CRS58242)	No Error
STATE v. VENABLE No. 15-805	Alamance (13CRS54564)	No error in part; vacated and remanded in part

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